

Public questionnaire for 2018 Evaluation of Consortia Block Exemption Regulation

Fields marked with * are mandatory.

Introduction

Background and aim of questionnaire

Consortia are agreements between liner shipping carriers for the joint operation of maritime transport service. The Consortia Block Exemption Regulation, Commission Regulation 906/2009 ("Consortia BER"), sets the specific conditions under which certain consortia agreements can benefit from exemption to Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") in accordance with Article 101(3) TFEU. These conditions aim at ensuring that consumers enjoy a fair share of the resulting benefits. The current Consortia BER will expire on 25 April 2020.

The current Consortia BER is based on the enabling Council Regulation 246/2009 which provides that, in accordance with the provisions of Article 101(3) TFEU, the Commission may, by way of Regulation, exempt consortia agreements from the application of Article 101(1) TFEU, for a period limited to five years but with the possibility of prolongation.

This public questionnaire represents one of the methods of information gathering in the evaluation of the Consortia BER, which started in May 2018. In order to assess the impact and relevance of Consortia BER, the specific purpose of this questionnaire is to collect views and evidence from the public and the stakeholders on the following criteria: Effectiveness, Efficiency, Relevance, Coherence and EU added value. The collected information will provide part of the evidence base for determining whether the Consortia BER should be left to expire or prolonged (and if so, under which conditions).

The responses from this consultation will be analysed and the summary of the main points and conclusions will be made public on the [consultation website](#).

Nothing in this questionnaire may be interpreted as stating an official position of the European Commission.

Submission of your contribution

You are invited to reply to this public consultation preferably by answering the questionnaire online. To facilitate the analysis of your replies we would kindly ask you to keep your answers concise and to the point. You may include documents and URLs for relevant online content in your replies.

Alternatively, you can send your contribution by email to the following functional mailbox: COMP-CONSORTIA-EVALUATION-2018@ec.europa.eu.

For your information, you have the possibility to save your questionnaire as "draft" and continue replying later. In order to do this you have to click on "Save as Draft" and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access again and continue replying to your questionnaire.

Duration of the consultation

The consultation on this questionnaire will be open for 12 weeks from 27/09/2018 to 20/12/2018.

Privacy and Confidentiality

In the responses to this questionnaire the identity of the stakeholder should be clearly indicated in the section "Stakeholder's profile". If available, the ID number of the EU [Transparency Register](#) should also be provided.

* Publication Privacy Setting

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- ☒ **Anonymous** - Only your type, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.
- ☐ **Public** - Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

☒ * I agree with the [personal data protection provisions](#).

Stakeholder's profile

1. You are replying:

- ☐ As an individual in your personal capacity
- ☒ In your professional capacity on behalf of an organisation

4. a) Country of residence

- ☐ Austria
- ☐ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czech Republic
- ☒ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece

- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg
- ☐ Malta
- ☐ Netherlands
- ☐ Other
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovak Republic
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom

5. Name of organization

6. a) Type of organization:

- ☒ Company
- ☐ Professional consultancy, law firm, self-employed lawyer/consultant
- ☐ Research and academia
- ☐ Nongovernmental organisation or association
- ☐ International, national, regional or local public authority
- ☐ Other

7. a) Type of company:

- ☒ Carrier
- ☐ Shipper
- ☐ Freight-forwarding company
- ☐ Logistics company
- ☐ Port authority or port services provider
- ☐ Other

8. Is your organisation included in the Transparency Register?

- ☐ Yes
- ☐ No

If your organisation is not registered, we invite you to register here, although it is not compulsory to be registered to reply to this consultation. [Why a transparency register?](#)

9. Please describe the activities of your organisation.

250 character(s) maximum

Section 1: Effectiveness

Consortia are cooperation agreements between carriers and, where concluded between competitors, may potentially fall under Article 101 TFEU. Carriers are therefore required to assess whether their cooperation agreements are compliant with Article 101 TFEU. For that purpose the Consortia BER may provide guidance.

10. a) Do you consider that the Consortia BER provides high level of legal certainty?

☒ Yes

☐ No

10. b) Please explain.

1000 character(s) maximum

Consortia have existed as a necessity in a complex and global industry for decades - providing scale efficiencies for carriers and better product offerings, often at lower rates, to consumers.

The Consortia BER (BER) provides a high level of legal certainty as a targeted exemption, specifically addressing the unique features of consortia. As carriers need to swiftly respond to changes in demand and supply, legal certainty is paramount to ensure carriers have the agility to rapidly and consistently conclude consortia.

Finally, consortia exist on a global scale and are assessed under the legal regimes of numerous jurisdictions - consortia vessels call a string of ports in many countries on a single trade route. The legal certainty provided by the BER, its force of law and international recognition, is thus additionally important.

11. a) Please estimate the level of legal certainty provided by the Consortia BER on the following issues:

	Very high	High	Intermediate	Low	Very low	I don't know
Market definition	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Market share calculation	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Exchange of information	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Capacity adjustments in response to fluctuations in supply and demand	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The concept of highly integrated consortia	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Overall compliance with competition law	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

The right to withdraw and notice period for members' exit from consortia	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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11. b) Please explain the reasons for your rating.

1000 character(s) maximum

The recitals and the articles of the BER provide clear and concise guidance on the majority of the above-mentioned topics.

Where we have indicated that the BERs provide a "Very High" level of legal certainty, we believe that the interpretation and application of the concept is clear based on the BER alone.

Where we have indicated that the BER provides a "High" level of legal certainty, the interpretation and the application of the listed concepts are less clear and we do not rely on the BER alone but rather the intention and application of the above listed concepts, are interpreted with additional support from the EU

Commission, past experiences and through the frequent use of the BER.

The concept of highly integrated consortia is less well understood. We acknowledge that while the BER indicates that it relates to those consortia that require significant upfront investment, it is less clear what is meant by this concept.

12. a) Based on your experience, to what extent does self-assessment of a consortium's compliance with EU competition law rely on instruments other than Consortia BER that provide guidance on the interpretation of Article 101 TFEU (for example: the Horizontal Guidelines, Article 101(3) Guidelines, the Specialisation BER and EC decisional practice)?

	Very high	High	Intermediate	Low	Very low	I don't know
Horizontal Guidelines	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Article 101 (3) TFEU Guidelines	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Specialisation BER	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
EC decisional practice	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

12. b) Please explain the reasons for your rating.

1000 character(s) maximum

Article 101(3) and the Horizontal Guidelines are generic instruments. We generally refer to the Horizontal Guidelines only where certain additional elements are added to consortia – e.g. where consortia members may enter joint purchasing agreements, The Article 101(3) Guidelines are referred to for additional certainty when market shares of the consortia members exceed the BERs 30% threshold. EC decisional practice from merger decisions and commitments is the most useful in our self-assessments, as we can interpret the Commission's view on consortia in relation to market dynamics, benefits to consumers and counterfactuals. There are no EC decisions relating to consortia themselves.

Although the Specialisation BER technically applies to services, its application to services is less obvious and we don't feel its provisions are relevant to assess consortia. Further, the market share threshold is too low to cover most consortia.

13. a) Does the Consortia BER encourage types of cooperation that are not efficient or do not benefit customers?

☐ Yes

☒ No

13. b) Please provide examples and explain how prevalent they are.

1000 character(s) maximum

Consortia are the prevalent form of operational cooperation amongst carriers in the industry. As the BER sets out the core basic parameters of consortia, we do not believe that the BER encourages other types of cooperation that are not efficient and not to the benefit of consumers. Although the BER does not apply to consortia that exceed the 30% market share threshold, its guidance and principles are central to the analysis of consortia falling outside the protection of the BER.

14. a) Conversely, does the Consortia BER discourage any practices that would be efficient and benefit customers?

☐ Yes

☒ No

14. b) Please provide examples and explain how prevalent such types of cooperation could be.

1000 character(s) maximum

Whilst the BER provides guidance on how carriers can cooperate, it does not operate as a “straight-jacket” for carriers.

If there is a strong business & efficiency rationale for a particular consortium, the BER is not an instrument that would discourage this (e.g. 2M).

Beyond consortia, carriers continue to innovate beyond the scope of the BER – currently most notably within the digital space. To name a few digital consortia between carriers and other industry participants, refer to: TradeLens; Intra; the Digital Container Shipping Association; & the recent Global Shipping Business Network.

It should be noted that such forms of cooperation may be subject to different regulations in different jurisdictions, which are not coherent or aligned – such as the laws on joint procurement. Such divergent regulations may in the circumstances discourage practices that may well benefit consumers. By contrast, instruments like the BER promotes coherence across countries & thus legal certainty.

15. a) In your experience, do members of the same consortium compete between themselves in terms of prices or certain types of services?

☒ Yes

☐ No

15. b) Please explain.

1000 character(s) maximum

Our own experience echoes the Commission's finding in CSAV/HGV/Kühne Maritime/Hapag-Lloyd AG— i.e. that consortia members compete between themselves and with other carriers. In fact, competition is often more intense within a consortium than outside as consortium members are perfect substitutes for one another - they offer the exact same ocean transportation service.

Many customers enjoy bargaining power vis-à-vis carriers, and often source their requirements from multiple carriers - irrespective of consortia membership. Customers benefit from competition on prices and terms of sale, including within one and the same consortium.

Our experience is that consortia members fiercely compete with each other (and all other carriers) not only on price, but also on other parameters, such as: sales process and client relationship; quality of the overall customer service; inland transportation and warehousing; and access to networks outside of the consortia.

Section 2: Efficiency

16. Does the compliance with Consortia BER generate costs? Would you be able to quantify them (in absolute value as well as relative value, i.e. percentage of your annual turnover)? Please explain.

1000 character(s) maximum

Compliance with all laws generates costs. Management of compliance is generally outsourced or internally resourced. (...) has a dedicated team of competition law specialists, who in turn rely on the BER to rapidly identify the parameters within which consortia can operate, to provide legal certainty to the business and to reduce the risk of non-compliance with competition laws. Compliance costs are significantly mitigated by relying on the BER. Should the BER be repealed we would expect to incur additional costs in relying on external counsel and possibly economists. Smaller lines would most likely have to rely on external resources to a greater degree to conduct their self-assessments, which may in the circumstances increase the need for (...) to also engage external counsel when partnering with these lines.

17. a) In your view, if the Consortia BER were not prolonged and self-assessment would rely on other instruments that provide guidance on the interpretation of Article 101 TFEU (for example: the Horizontal Guidelines, Article 101 (3) Guidelines, the Specialisation BER and EC decisional practice) would the costs of compliance increase?

☒ Yes

☐ No

17. b) Please explain and provide estimate of the change in compliance costs.

1000 character(s) maximum

The BER has greatly assisted our compliance efforts in this complex and nuanced industry. (...) currently has 5 VSA agreements operating on 20 deep sea trade routes (head haul and back haul counted individually) calling Europe. If the BER is removed, compliance costs would increase due to a need to rely on external legal counsel and economists. We estimated the degree of this increase by using, as a proxy, the costs of filing a small merger in the EU and a handful of other jurisdictions, per concluded consortium—which as the Commission is aware, is not insignificant. Consortia typically have a 1 to 2-year duration, thus this exercise would need to be repeated at least every time a consortium is entered into, but also where significant changes occur.

A further opportunity cost is the increased time taken to advise the business. In a competitive market with surplus capacity, any delays on exploiting opportunities directly translates into foregone revenue.

Section 3: Relevance

18. What were the major trends and changes in the liner shipping industry in the past 5 years?

1000 character(s) maximum

Over the last 5 years the container liner shipping industry has come under significant pressure with excess capacity, dwindling demand and decreasing profitability. Carriers have responded by seeking to reduce the overall cost of transport per container, in large part through upgrading their fleets to more fuel-efficient vessels with larger carrying capacity, through consolidation or consortia to continue to provide competitive services to our customers. The industry has been in crisis for the past 10 years. This is evident as over the past 5 years there has been a degree of consolidation, a Korean carrier exiting the market, the reorganisation of global alliances, increased supply/demand imbalances, increasing fuel costs and state intervention in the industry. Carriers are striving to attain economies of scale, operate economically, innovate digitally and survive.

19. a) Have you noticed any or more of the following changes to the consortia landscape in the past 5 years:

	Significant increase	Moderate Increase	Stable	Moderate decrease	Significant decrease	Don't know
Number of consortia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Number of carriers operating outside consortia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Number of members in individual consortium	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Capacity deployed by individual consortia	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Number of ports served by consortia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

19. b) Please explain.

1000 character(s) maximum

Following consolidation across the industry there has been a decrease in the number of consortia, carriers and consortia members alike as there are fewer carriers to participate in consortia. The intensity of cooperation between consortia members has however increased, as has the capacity carried by consortia members in order to obtain economies of scale and compete economically.

The number of ports served by consortia has remained stable as carriers provide their services where consumers demand them.

20. a) What were the effects of the developments you identified in response to 3.1 and 3.2 on competition in the liner shipping sector on:

	Significant increase	Moderate Increase	Stable	Moderate decrease	Significant decrease	Don't know
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Choice of services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

20. b) Please explain.

1000 character(s) maximum

Prices have significantly decreased due to overcapacity in the market, larger and more fuel-efficient vessels being used, and decreased global demand for consumer goods. As a result carriers have been forced into cost cutting to remain competitive.

Decreasing profitability reduces capital to improve quality and variety of services. Nonetheless a few carriers have been innovating in the digital space to provide better and differentiated add-on services to customers. Carrier's main customers are large and sophisticated multinational freight forwarders and large global manufacturers. They regularly multisource their shipping needs across a number of carriers, place shadow bookings with several carriers, and typically negotiate prices to the lowest possible offer before cancelling more expensive bookings at the last minute. This practice reduces a carrier's ability to plan its capacity effectively and may cause service disruptions.

21. a) Are you aware of types of cooperation between carriers that are not covered by the Consortia BER?

- ☒ Yes
- ☐ No

21. b) If yes, please describe them and assess how prevalent they are.

250 character(s) maximum

Carriers cooperate in consortia that fall outside the terms of the BER (e.g. 2M).

In addition, there are non-consortia cooperation between carriers, particularly in the digital space - which we list in our response to question 27 below.

22. a) Do carriers cooperate in joint purchasing (e.g. port services, inland transport, feeder transport)?

☒ Yes

☐ No

22. b) If yes, is such cooperation prevalent? Please explain

1000 character(s) maximum

We do not currently engage in joint purchasing activities, despite noting that joint purchasing may be efficiency enhancing. However, we clearly cannot comment on the activities of other carriers. We note that in certain jurisdictions joint procurement may be prohibited, although noting that in Europe carriers are not per se restricted from jointly procuring. In our view, the Horizontal Guidelines provide sufficient guidance on this conduct.

23. What would you expect to be the effects in case the Consortia BER would not be prolonged? Please illustrate with concrete examples.

23. a) Effects on your organisation

1000 character(s) maximum

Irrespective of the BER, any consortia that we enter into would comply with EU law, including the Horizontal Guidelines and Article 101(3) Guidelines. The removal of the BER would however unnecessarily increase the costs of compliance, decrease the legal certainty required to conclude consortia, render (...) less agile to respond to shift in consumer demand in various trade routes and the increase the risks of non-compliance in entering further consortia and/or amending existing consortia.

23. b) Global or industry effects

1000 character(s) maximum

We would expect an adverse domino effect if the BER is not prolonged, with the relevant consortia exemption structures in multiple jurisdictions globally being reviewed and/or revoked. In addition to the legal uncertainty this would bring, carriers would incur significant costs in the short to medium term to reorganize networks and redeploy assets as a result of this.

The BER has the force of law and whilst there may be other guidelines and instruments that are published by the European Commission these do not have the same force of law. Consequently, other jurisdictions may incorrectly view its revocation as a declaration of uncertainty regarding the assessment of consortia or even worse, incorrectly as undesirable. This would erode the legal certainty consortia require to operate on global scales. We would expect to see the dissolution of various consortia and the inability of smaller carriers to compete with the same scale and scope as they are able to as consortia members.

24. a) BERs are exceptional instruments. Considering that only very few industries have a sector-specific BER applying to them, do you consider that liner shipping presents such unique characteristics that require a sector-specific BER?

- ☒ Yes
☐ No

24. b) Please explain.

1000 character(s) maximum

Few industries have the same characteristics as the container liner shipping industry, having regard to:

- (i) its cross-border reach and the fact that a single trade string calls ports in multiple jurisdictions with different laws;
- (ii) the presence of state intervention into shipbuilding and liner shipping that artificially fuels global surplus capacity;
- (iii) its proneness to overcapacity, due to supply/demand trade balances, assymetric and cyclical consumer demand that is largely influenced by the global economy and geopolitical developments; and
- (iv) the timelag between ordering new vessels and their delivery and how market conditions can change in the period between.

For the above reasons, consortia require timely formation with sufficient legal certainty, to respond to fluctuating industry conditions to ensure minimal operating costs and economies of scale in their operations. Consortia have existed for decades and are an inherent part of this industry.

Section 4: Coherence

25. a) Based on your experience, is the Consortia BER coherent with other instruments that provide guidance on the interpretation of Article 101 TFEU (for example: the Horizontal Guidelines, Article 101(3) Guidelines, the Specialisation BER and EC decisional practice)?

- ☒ Yes
☐ No

25. b) Please explain.

1000 character(s) maximum

As discussed previously, the other listed instruments do not provide sufficient guidance and seem ill equipped to deal with consortia – being a very specialized service in a global multi-jurisdictional market, with numerous regulatory stakeholders – each with their own political mandates.

The BER provides clear and definitive guidance on consortia and in our experience is seen as the authoritative piece of legislation to review, interpret and assess consortia. Therefore this has a harmonizing effect across jurisdictions.

Section 5: EU added value

26. a) Does the Consortia BER have added value in the assessment of the compatibility of consortia with Article 101 TFEU compared to, in its absence, self-assessment based on other instruments that provide guidance on the interpretation of Article 101 TFEU?

- ☒ Yes
☐ No

26. b) Please explain.

1000 character(s) maximum

The BER is a sector specific and targeted instrument, which provides guidance to market participants a very complex, global and distressed industry.

The Horizontal Guidelines and the Article 101(3) Guidelines are more generic instruments that do not provide the same degree of requisite guidance that is found in the BER. Furthermore, these guidelines do not have the force of law that the BER possesses.

Final comments and document upload

27. If there anything else you would like to say which may be relevant for the evaluation of the Consortia BER, feel free to do so.

1000 character(s) maximum

Carriers are increasingly cooperating in the digital space, which we believe will increase over time and currently include, amongst others: (i) Digital Container Shipping Association - that aims to enable the industry to develop standards for IT and non-competitive aspects of business; (ii) TradeLens - a digital solution for the industry, using blockchain technology, to increase supply chain visibility and reduce documentation costs across a containers journey; (iii) Global Shipping Business Network – another blockchain consortium between carriers and terminal operators; and (iv) Intra - a digital innovation project that created a standard electronic booking system and which has since evolved to provide a full range of software solutions and services for multiple entities in the industry supply chain.

28. If you wish to attach relevant supporting documents for any of your replies to the questions above, feel free to do so.

The maximum file size is 1 MB

Contact

COMP-CONSORTIA-EVALUATION-2018@ec.europa.eu
