

# Public questionnaire for 2018 Evaluation of Consortia Block Exemption Regulation

Fields marked with \* are mandatory.

## Introduction

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### 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](mailto: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

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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

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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

OTM Belgian Shippers' Council

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

OTM Belgian Shippers' Council represents the logistics interests of manufacturers, retailers, wholesalers and cargo owners collectively referred to as shippers in Belgium. OTM is a network organization also engaging in lobbying on behalf of Shippers.

## 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

The self assessments are not public so there is no certainty provided on how the market will evolve. Several actions in the recent past, like the Bunker Adjustment surcharge and the Sulphur surcharge, may have been a breach of the price-fixing criteria in the BER, but it is difficult to prove that. When the consortia would fall under the 101(1), the burden of proof is reversed and that would allow the shippers, as customers of the consortia, a much better means to protect themselves against potential price-fixing.

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 type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Market share calculation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Exchange of information	<input type="radio"/>	<input type="radio"/>	<input checked="" 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 type="radio"/>	<input type="radio"/>	<input checked="" 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 type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" 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"/>

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

1000 character(s) maximum

Based on feedback from our member shippers it is clear that for customers of a consortium it is very difficult to verify whether a consortium is breaking the provisions of the BER. From that perspective the legal certainty that the BER offers to the shippers is deemed low. This is why we rate most characteristics as low.

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 checked="" type="radio"/>				
Article 101 (3) TFEU Guidelines	<input type="radio"/>	<input checked="" type="radio"/>				
Specialisation BER	<input type="radio"/>	<input checked="" type="radio"/>				
EC decisional practice	<input type="radio"/>	<input checked="" type="radio"/>				
Other	<input type="radio"/>	<input checked="" type="radio"/>				

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

*1000 character(s) maximum*

OTM, representing shippers' interests, does not have access to information (and neither have shippers) on the way carriers self assess. It is therefore not possible to know which instruments they use. For that reason we rated "I don't know".

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*

Some indications exist that prices are fixed or that there at least exist forms of price-signaling. That this could be linked to the BER is not supported by any evidence. Announcement of surcharges start with a single carrier and is then (quickly) followed by multiple carriers of multiple consortia, but this is not linked to the existence of consortia or the BER itself in any way that we can discern.

Our members have not indicated much or any sharing of benefits with them at all, quite the contrary. The service level has only decreased in the past 5 years. This is indicated by a decrease in the number of direct port-calls, an increase in port congestions caused by the ULCVs and a general prolongation of port-call duration. More and more port stop & leave actions have been noticed and blank sailings have not decreased. The "booking crunch" collapse is a more recent phenomenon that affects current capacity.

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*

From the recent past it is clear that consortia continue to decrease the amount of direct port-port connections. This in turn increases transit-times for destinations that are not served by the main hub-ports. Also the frequency of services has gone down despite the fact that the total capacity offered has risen, which is a result of the larger vessel sizes. The differentiated offering of carriers before they united in a consortium is also decreasing because they now combine services, which in turn decreases the sailings-frequency. In this way services become more concentrated and service orientation based on "Voice of the Customer" is no longer offered, leading to a lower variety of services. Although it is fair to say that this is not only the result of the existence of consortia, the fact that customer service departments have been combined leads to less and less tailored services offered to cargo owners.

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*

There are many indications that price signaling may still exist where surcharges are concerned, but the base fares offered by individual carriers seem not to be affected because they have formed consortia. Prices in general seem no to have increased because consortia were formed, the general price level still seems competitive. However the rate fragmentation that is still abundantly present in the market does lead to an increase in total final costs for the end-users and the cargo owners (increase in demurrage and detention e. g.).

## Section 2: Efficiency

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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*

For OTM as representative of shippers and based on feedback from our members, it is unclear which costs the carriers are forced to bear to be BER-compliant. However it does not seem logical that carriers would engage in consortia if that would not bring some cost benefits or at least that the extra costs are offset by the other benefits that consortia bring. OTM does not have access to data to prove or disprove this. Looking at it from the shippers' perspective it is clear that in the past 5 years shippers have had to build higher stock levels at their manufacturing sites or warehouses, caused by the increased congestion and service concentration.

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*

Again as for question 16, shippers have no access to the carriers' books so it is impossible to tell if having to comply with general competition law when they become part of consortia would increase their costs. But again it seems logical that higher costs ensue from stricter rules when subject to general competition law and the reversal of the burden of proof in case of litigation. Because of the above it is impossible for shippers' representatives to even estimate the increase in costs, but it seems equally logical that the stricter rules are the higher the costs would be.

## Section 3: Relevance

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

*1000 character(s) maximum*

- Larger vessels: frequency of sailings goes down; no decrease in blank sailings; less port-to-port pairs are serviced, increasing average transit-times. The ports that are equipped to cater for the ULCVs suffer from higher congestion as the port-stays become longer, peak-times last longer and detention and demurrage increases.
- Major consortia: also lower sailing frequency; more restricted options for shippers to select the vessel-operator they sail with. Carriage of cargo can be transferred to other consortia members without informing the shipper, so he can no longer freely opt for the better service; the lowest common denominator amongst the carriers in a consortium now determines the service level.
- Clear deterioration of service and much lower carrier differentiation – all carriers now trend down towards the same (low) service resulting. They have now truly commoditized their product.

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 checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Number of carriers operating outside consortia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Number of members in individual consortium	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Capacity deployed by individual consortia	<input checked="" type="radio"/>	<input 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

Based on what is published on a regular basis by outside consultants like Alphaliner.

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 checked="" type="radio"/>	<input type="radio"/>	<input 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 type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

20. b) Please explain.

1000 character(s) maximum

The answer here also refers back to the answers provided in questions 18 and 19.

- The fluctuation of the prices in the past 5 to 10 years has been dramatic. This is a clear result of the supply-demand balance for liner transport and not so much linked to the existence of consortia. To us this volatility demonstrates that the shipping industry is not a well-balanced, healthy industry.
- Where carriers claim that their service offering is now better than it has ever been, which is true if you look at the number of destination ports that any carrier offers, the way they have organized this (hub-and-spoke model with transshipment) slashing the frequency of sailings for any given port-pair and increased the average transit-times, has in no way increased the service they offer to the market. Cost-pressure has resulted in carriers reducing their customer service staff and in that way customer requested service levels are no longer truly an option - all offered services are the same.

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

- Yes  
 No

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

- Yes  
 No

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*

The effect on OTM itself is zero, but that is not really relevant. The effect on the shippers we represent is difficult to determine since we lack data to support this, but this is elaborated in answer 23.b.

23. b) Global or industry effects

*1000 character(s) maximum*

Eliminating BER does not imply consortia are no longer possible. Evidence in other industries, that were even subject to more specific rules protecting them, shows that the BER itself is not a prerequisite for any industry to survive, adjusting to full competition law is possible for any industry. When ending the BER would be phased instead of a hard-stop, we believe only minimal short-term effects would befall shippers and in the long term we believe this will lead to a better industry and a more differentiated service offering that shippers can choose from as carriers can bring this into their offering again.

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*

OTM proposes to revoke and replace the current BER. This position is more closely explained in the final comment of this questionnaire.

## Section 4: Coherence

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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*

The BER positions the carriers in such a way that the ensuing market promotes conditions that are not always favorable to customers.

## Section 5: EU added value

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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*

Disbanding the BER does not automatically mean that consortia would no longer be possible, within Article 101 TFEU there are also opportunities for carriers to cooperate in a similar way as within the consortia today. However shippers would have much better ways to react when carriers seem to be breaching competition law. This can also lead to renewed communication and cooperation between carriers and shippers and a win-win could be the result, where differentiated services at differentiated prices are offered, allowing shippers to choose the model that best fits their unique Supply Chain. It opens up an whole new world of possibilities, where shipper who are willing to pay for it, can again choose for premium services. In the present-day market the carriers are not willing/able to offer this any longer and BER is likely one of the contributors to this.

## Final comments and document upload

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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*

This survey was completed by Lennart Heip, national chairman of OTM with the OTM-account.

OTM recommends to revoke and replace the BER as it exists today. The new BER shall apply under a lower than 30% market share and to consortia which do not exceed a certain size. For the others self-assessment of the benefits of the collaboration for the stakeholders shall include criteria formulated in a SMART-way. Finally the replacing BER shall provide for review by EC of the consequences on the market of M&A between 2 members of different very large consortia. Also, to reach a well-functioning market despite its high level of concentration, other (legal) instruments shall be considered as part of a paradigm-shift, such as offering to smaller shippers some kind of protection against the conditions applied to them by the market. If all these conditions are not met ESC prefers the BER to be discontinued completely

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

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