

# 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

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

6. b) If Other, please specify type of your organization:

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*

We can comment on this question only from a port authority's point of view. As we are not subjected to the Consortia BER, our assessment is that of an external third party.

In our view, the given threshold of 30% market share is rather artificial and is based on self-assessment. By the time this threshold was set there was no company or group close to such a strong share (oligopolistic or even dominating structure). Today 3 strong "alliances" dominate the strongest traffic flow (volume wise) to and from Europe, which is to/from Far East Asia. The control and enforcement of the boundaries to cooperation permissible under the BER seems difficult and potentially ineffective.

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 type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Market share calculation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Exchange of information	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Capacity adjustments in response to fluctuations in supply and demand	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The concept of highly integrated consortia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Overall compliance with competition law	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The right to withdraw and notice period for members' exit from consortia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

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

*1000 character(s) maximum*

As we are not submitted to the rules we cannot properly comment on these issues of practical application of the BER.

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

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

*1000 character(s) maximum*

We as a Port Authority have no insights in this issue.

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*

Joint operation of services has facilitated a trend towards bigger vessels (ULCV) as they can be properly utilized only within alliances. Without alliances lines would not have invested into ULCV as they did, because such investments would have been much riskier for one company alone. ULCV force ports to invest into infrastructure, which many cannot recuperate. In addition, ports increasingly have to make depreciations on fixed assets because long-term infrastructure investments of ports or terminals become outdated and useless before they have paid off. To achieve the high utilization rates necessary to operate ULCVs cost-effectively, ULCV call at fewer ports, the service frequency is reduced, the schedule reliability has shrunk and waiting times have become longer. The 3 alliances have an oligopolistic bargaining power vis-à-vis ports, terminals and port service providers leading to low sustainability of investments and reduced economic certainty and predictability for ports.

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*

More healthy competition might make transport slightly more expensive. But lines could differentiate better in terms of quality of services, types of services offered and eventually price as well. The transport market would be balanced out better and healthy competition could create progress and overall efficiency and effectiveness, which develops not at the expense of other stakeholders in the logistics chain.

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*

Member of the same consortium compete but price differentiation is not as practicable as it is under normal market conditions. Imagine a group of two lines in one alliance: Line A considers itself high-quality and charges higher but also buys slot on fellow line B. Line B considers itself primarily as low-cost and to a lesser extent high-quality. Why should a customer book at line A (pay a higher price...) when he does not know whether he will be served by line A or line B (pooling of vessels or slot exchange). So, he buys at line B, thus reducing quality and differentiation even more. Under the current scheme competition is mainly on price but not so much on other factors. If there were no consortia, prices might be slightly higher overall. On the other hand, the different requirement of actors in the transport chain would be balanced out better.

## 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

As a port authority we do not (have to) comply with the Consortia BER, and cannot answer this question.

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

Administrative costs at EU-level and shipping companies' lawyers fees could be expected to increase if there were no extension of the BER. We do assume, however, that overall transport chain cost and ecological footprint would be lower and sustainability be better, overall.

## 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

Consolidation (the bigger got even bigger, both in absolute and relative figures), cutthroat competition between alliances (dumping prices to fill the ships, insolvency of the major Korean shipping line Hanjin), environmental issues become more and more important (goal to switch away from fossil fuel, global warming etc.), digitalization (e-B/L; cooperation with other actors in the transport chain, if not vertical integration)..., less loops per traffic, less direct port calls, ever bigger ships etc.

In our view the market today is characterized by oligopolistic structures: fewer and fewer independent shipping lines cooperate in three alliances. This market structure has detrimental effects on all other stakeholders in the logistic chain, including ports. Shipping lines can move their assets (vessels) while ports have to invest into immovable assets, which have a recovery period of up to 50 years.

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



19. b) Please explain.

1000 character(s) maximum

Currently only 3 alliances remain. One alliance with number 1 and 2 in the world, where each line could act independently if wanted. Very few left outside consortia (e.g. ZIM) which could only act as niche player. As the number of players has shrunk faster than the number of consortia, the average number of players per consortia has decreased even stronger. One effect of the BER – amongst other factors – is that lines think they can only survive as a global carrier if they offer huge vessels. This has created overcapacity on the main east west routes and harmful cascading effects of the existing vessels dripping into other markets - instead of being scrapped. In order to extend voyage time not so much, the alliances have reduced the number of direct port calls.

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

20. b) Please explain.

1000 character(s) maximum

Prices of the seaborne leg of the transport chain were pretty stable (exemptions apply). The price per ton or TEU, however, is so low that the overall picture sometimes does not seem to be sustainable any more. This, however, is not caused by positive effects of cooperation within alliances but by the overcapacities in the market which do not allow sustainable pricing. The choice of services for the shipper/forwarder has decreased and transport chains become more complicated and exposed to disturbances. Finally, also the quality of services from the shippers' or ports' point of view has fallen (less direct calls, less punctuality, less balanced operating but more peaks and lows, less alternatives, less bargaining power).

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

Several, i.e. vessel sharing agreements even if not in the same alliance.

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*

Carriers cooperate within an alliance but when it comes to purchasing and contracts they usually act as own entities. That means that services are usually not contracted in the name of the respective alliance but in the name of the individual carrier. But there are clear indications for coordinated behaviour of shipping lines within an alliance. For example, they may use the same feeder vessel of an alliance partner if that partner is already in the market but they usually have own contracts. This applies to feeder services for transshipment, for using the same terminal (especially if one alliance member owns at least a stake in a terminal in the port at question), tug services, sometimes inland transport (using the same truck, rail or barge company) or empty container depots.

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*

Abolishing the BER would force shipping lines to better highlight the beneficial effects of their cooperation which would normally be prohibited under Art. 101(1) TFEU. Thus the pressure of competition law on the shipping lines would be increased. This has to be welcomed: For port authorities (and terminals) the negative oligopolistic structures of the current alliance system (as explained above), which are favoured by the current BER, cause a lot of financial and practical challenges. The advantages of economies of scale on the liners side have a clear negative effect on the suppliers' side of infra- and superstructures. We experience that many infrastructure investments made in the past to accommodate the shipping lines' needs do not produce a proper return (or even become obsolete) as they were "overtaken" by the alliances' policies to deploy larger and larger vessels, or their decision to remove services from a port (which cannot quickly be substituted for lack of competition).

23. b) Global or industry effects

*1000 character(s) maximum*

We would expect that more commercial rationale comes into the markets. Shipping lines had to take more commercial risks themselves and would be more careful. Oversupply of capacity would shrink. Bargaining power would become more evenly distributed. Gigantism of ships and lines is expected to shrink. There might be slight price increases on the main direct line but there would also be better service quality and a more diversified service portfolio.

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*

The Consortia BER might have been a good instrument when it was introduced in this market. But, times have changed. Most general cargo business is already containerized. Traffic can flow easily and operations can run smoothly. When measured against the goals for the introduction of the Consortia BER, as defined in recitals 4-6 in Regulation 246/2009, we do not need this BER anymore. Nowadays, the BER creates benefits almost entirely for the shipping lines and works to the detriment of other stakeholders in the logistic chain. The effect on prices for customers is minimal: the current prices are the result of the existing overcapacities in the market.

## 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*

Without thorough analysis of other instruments, this question is difficult to answer. The liner shipping sector is not or no longer characterized by special features which may justify a BER with such a broad exemption.

## 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*

The European added values that is supposed to come from the Consortia BER is summarized in recitals (4) to (6) of Regulation 246/2009, which is the legal basis for the Consortia BER. In 2018 these goals have been reached and are hence obsolete. Since we believe that the current concentration in the liner shipping sector and the cooperation of the few remaining independent lines in three alliances has produced oligopolistic structures which are beneficial only to the participants of the oligopoly, we do not see any added value coming from the Consortia BER. Self-assessment under Art. 101 (3) TFEU directly would increase the pressure of competition law on lines.

## 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*

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

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