

# 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

### 2. First name

### 3. Last name

### 4. a) Country of residence

☒ Germany

### 4. b) If Other, please specify which country:

### 5. Name of organization

Hapag-Lloyd AG, Hamburg

### 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

**7.b) If Other, please specify which type of company:**

**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.**

Hapag-Lloyd operates 226 modern ships, transports abt. 9.8 million TEU (Twenty-foot Equivalent Unit) transported per year (2017), employs around 12,000 employees in 389 offices in 127 countries. Hapag-Lloyd is a leading global liner shipping company.

Hapag-Lloyd offers a fleet with a total capacity of 1.6 Million TEU, as well as a container stock of more than 2.5 million TEU including one of the world's largest and most modern reefer container fleets. A total of 120 liner services worldwide ensure fast and reliable connections between more than 600 ports on all the continents.

The owners of Hapag-Lloyd are CSAV (25.8%), Klaus Michael Kühne (incl. Kühne Holding AG and Kühne Maritime GmbH (25.0%), HGV Hamburger Gesellschaft für Vermögens- und Beteiligungsmanagement mbH (13.9%), Qatar Investment Authority (14.5%), the Public Investment Fund on behalf of the Kingdom of Saudi Arabia (10.2%), plus a free float of 10.6% (percentages have been rounded and the free float includes institutional shareholders with a shareholding of less than 5%).

Hapag-Lloyd has a 25.1% stake in Container Terminal Altenwerder GmbH ("CTA"). CTA operates Container Terminal Altenwerder in the Port of Hamburg. However, this is not considered as a controlling interest but pure equity share only.

## Section 1: Effectiveness

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**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.**

A number of important issues are clearly spelled out in the CBER, such as:

- The 30% market share threshold (whereas the horizontal guidelines have between 15-25% for different cases – and the shipping industry is not even mentioned in the HGLs).
- The clear activities under Art. 3.1 a-e to 3.3
- The special “restrictions” under Art. 4.b+c
- The “generous” exemption in Art. 5.3 from the conditions in Art. 5.1 (i.e. exceeding the 30% for a given time)
- The clarity on initial period and duration in Art. 6

Also the “Whereas-es” provide some comfort without which the basis of evaluating an VSA is much more difficult, i.e. they highlight some positive issues, such as:

- (2) COMP confirmed – at least in 2010 – that according to their experience the BER was still justified.
- (4) a clear statement that passing the market share threshold is not automatically putting the VSA under Art TFEU 101.1 (prohibition)
- (5) the BER confirms the general benefits of VSAs, which are still valid
- (6) confirms that “users benefits” do not only need to be monetary, but they list other examples
- (7) clarifies that market shares can be calculated on basis of port-ranges,.

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

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

As outlined also in response to Q. 10 above, the CBER spells out a number of things very clearly (those marked “very high” in this table), but others are a bit less definite (those marked less than “very high” above).

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

The main guidance for an initial self-assessment is the CBER. None of the other instruments gives proper guidance specific to 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.**

**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.**

for example joint procurement beyond terminal services (where permissible), or joint purchased or operation of rail, barge, storage services, IT services etc.. If it were covered in the CBER, it could stimulate such cooperations.

**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.**

yes. Price is one main criteria to differentiate from consortium member. Lots of "switched biz" (gained/lost to/from) between Consortia members and non-Consortia carriers. Shippers tend to split their volumes across various carriers in order to minimize their risk and to use it as a bargaining tool.

For all services that go beyond the pure operation of the consortium, i.e. landside services, inland transports, customer services, inland container depots, consultation on special cargo, IT/EDI, etc.

## 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.**

Yes. However, the level of cost can vary considerably, depending on:

- how many Selfassessments (SAs) need to be done (in a given year)
- whether a “slim” (basic check against CBER) or a comprehensive SA (with external counsels) is required
- whether one involves full legal and economic service or only basic advice or none at all

A full style SA, done by an external counsel incl. an economic study, may well cost abt. €241.000 in one year (normally shared equally by the parties). An update to the SA will only be a fraction of it.

In contrast, if the consortium is well within the CBER, a quick check (agreements, market shares, services, market) versus the CBER suffices and no external legal counsel or economic expert is required, one SA may cause internal costs of abt. €1.000.

Any SA, which is more complex than a “quick check”, but carried out mainly internally with reduced external legal and economic involvement will cause costs of abt. €15-20.000 each.

Given that those SA costs can be considered “unnecessary” and should not be seen as part of the fix or variable costs, at its best they should be calculated against the net profit, which in 2017 made abt. 1%.

**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.**

The involvement of external legal counsels would increase considerable and so would the legal and economists' fees.

Another impact could possibly be seen in other jurisdictions (outside Europe), where at present the EU CBER may serve regulators as a helpful tool for their own assessments. An abolition of the CBER could be misinterpreted as an adverse act against consortia and cause higher administrative costs there, too.

## Section 3: Relevance

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

We would consider:

- Merger & Acquisitions
- Increasing deployment of ULCVs
- Increasing focus on Embargo & Sanctions
- Increasing global enforcement activities by regulators
- Increasing governmental interference in private companies' business (pricing)

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

### 19. b) Please explain.

less players through M&A, whereas products (liner services) basically remained, whilst number of ULCVs increased.



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						
Choice of services						
Quality of services						

20. b) Please explain.

The major benefit for customers may be the reduced maritime freight costs. Attached is an extract from the CTS Databank comparing the Sept./Oct. 2018 rate-levels/index (= 100) on selected European Trades to the average rate-level in 2008. As can be seen, the October 2018 rates range between 47 – 80% (Export) and 52 – 70% (Import) of what they were 10 years ago. At the same time major cost components (bunkers, containers, etc.) have increased.

Hapag-Lloyd

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Container Trades Statistics

Latest Pls

By Trade

Region

SubRegion

Custom Pls

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All Trades

Trades

Sub-Trades

Please Note: Trades shown may be restricted by the Member Line's Access Rights

Europe

All

Year-on-Year

Month-on-Month

From	To	Container Type	Chart	October 2017	+/- %	September 2018	October 2018	+/- %
► Europe	Indian Sub Cont & Middle East	All	PI	82	-12.1%	72	72	0.0%
► Europe	South & Central America	All	PI	53	11.1%	59	59	0.0%
► Europe	North America	All	PI	72	11.0%	79	80	1.3%
► Europe	Sub Saharan Africa	All	PI	46	2.1%	47	47	0.0%
► Europe	Europe	All	PI	64	3.1%	66	66	0.0%
► Europe	Far East	All	PI	81	-13.4%	71	70	-1.4%
► Europe	Australasia & Oceania	All	PI	60	3.3%	61	62	1.6%



Latest Pls

**By Trade**

Region

SubRegion

Custom Pls

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**All Trades****Trades**

Sub-Trades

Please Note: Trades shown may be restricted by the Member Line's Access Rights

Please Note: Trades shown may be restricted by the member firm's Access Rights

				Year-on-Year		Month-on-Month		
		Europe	All					
From	To	Container Type	Chart	October 2017	+/- %	September 2018	October 2018	+/- %
▶ Sub Saharan Africa	Europe	All	PI	65	7.6%	73	70	-4.1%
▶ South & Central America	Europe	All	PI	60	13.1%	67	68	1.5%
▶ North America	Europe	All	PI	65	7.6%	71	70	-1.4%
▶ Indian Sub Cont & Middle East	Europe	All	PI	56	-8.8%	52	51	-1.9%
▶ Far East	Europe	All	PI	53	3.7%	58	55	-5.1%
▶ Europe	Europe	All	PI	64	3.1%	66	66	0.0%
▶ Australasia & Oceania	Europe	All	PI	67	1.5%	68	68	0.0%

Comparing the North Europe – Far East Trade (where the ULCVs are deployed) Situation 2018 and compare it to 2013 (based on publicly available data, such as Drewry and CTS / GI), following trends can be noted:

<u>Criteria:</u>	<u>2013</u>	<u>2018</u>	<u>Trend</u>
• Groups of Players	14	7	-50%
• Services / Loops	25	24	-4%
• Niche Carriers	2	0	-100%
• EB Capacity (TEU)	7.409.800	9.848.200	+ 33%
• WB Capacity (TEU)	10.372.900	12.439.300	+ 20%
• EB Volume (TEU)	4.690.000	5.816.600	+ 24%
• WB Volume (TEU)	9.252.900	10.536.100	+ 14%
• Nbr. of Loops with ships below 12.500 TEU avg.	17	9	- 53%
• Nbr. of Loops with ships above 12.500 TEU avg.	8	15	+ 67%
• Biggest avg. vessel size on a loop in TEU	14.295	19.865	+ 39%

Data bases on Drewry 3.Q. Report of the respective year for capacity and service data, and CTS for volume data (2018 = estimate).

Above key indicators seem to confirm that carriers did rationalize their services and groupings\* whilst providing more than sufficient Capacity in order to cover the demand. At the same time the number of loops / services almost remained the same but operated on average with much bigger ships. That seen in context with the falling rates seem to show that shippers had seen a fair share of the financial benefits, whilst the services level (number of loops / services) remained almost the same.

\*)= means bigger Alliances, less individual loop cooperations, like before. Additionally some carrier from 2013 disappeared through M&A or bankruptcy.

**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.**

The question seems a bit unclear. For example, it could refer to any consortia passing the 30% market share and thus is not covered by the BER (and HLAG is part of such consortia), or it could refer to any kind of cooperation that is unrelated to Consortia, but would then possibly not fit well into this consultation.

A more transport related cooperation between carriers is the "Equipment Interchange", i.e. the exchange of empty containers between carriers, specifically to address shortages of equipment in certain areas. Ideally, the demand for empty containers of the one party coincides with the oversupply of empty containers of the other party in a certain area. Such exchanges help to reduce empty transports, which have a negative impact on cost and environment. However, such equipment interchanges normally take place on bi-lateral basis and not at consortia basis. HLAG maintains a number of such agreements with different partners.

In the USA there exist some cooperative agreements in relation to chassis and equipment pooling / exchange in the USA between carriers. HLAG is member to such agreements.

Another kind of cooperation is a recently announced and still to be formed association with the purpose of paving the way for digitalization, standardization and interoperability in the container shipping industry. HLAG will be a member to that association.

**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**

HL does have both – either joint, individual contracts with terminals or a mix of both. It is logic for a Consortium to only call one terminal in a port per call, in order to save time and cost. It is of common interest to the members of a consortium to have agreement on capacity, berth windows, etc. It may be a different issue in view of terminal cost (terminal rates). If the consortium is the only service the members have in a given port, then a joint terminal rate negotiation may be favorable for them, as it provides better bargaining power. However, if for example, HL individually moves a much higher cargo volume through the same port / terminal, but mostly generated through other services than the consortium in question, then an individual terminal rate negotiation may be more attractive to HL (and the HL would add the consortium volume to its overall volume in that port / terminal). The HL individual terminal rates would not play any role in any joint Consortia negotiations.

**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**

After years of good experience with the CBER we would be left with insufficiently reliable legal guidance. We would certainly still continue to use the old CBER, but lacking its validity we would likely ask for more outside counsel advice. Legal fees would multiply.

Certain parts of the CBER did become part of our usual VSA agreements, such as the initial and lock-in / notice periods. Those would continue to be applied.

### 23. b) Global or industry effects

Liner Shipping is an international business and touches many legislations. The CBER not only provides legal certainty to the shipping industry, it seems to also serve at least some other national regulators as a helpful guidance. Abolishing the CBER could be misinterpreted as an adverse EU position towards consortia by those regulators. Legal uncertainty (and related costs) may rise on the other end of the trade, too. Carriers' preparedness to enter useful short term cooperations may vanish.

### 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.

In summary there is no industry has the same characteristics as liner shipping, not even airline business, which is often taken for comparison. There is also no specific reason, why to abolish a well-functioning BER at this stage, just for administrative reasons.

## 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.

Whereas legally the CBER certainly is coherent with the other instruments, it is very explicit and clear to the shipping industry (see response to Q. 10). That is not given with any of the other instruments and they can, therefore, not replace the CBER.

## 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.

The BER makes is easy to understand and to follow for the ordinary and number of smaller VSAs. Even for the bigger alliances it provides a good groundwork for the selfassessment. It facilitates in-house counsels to give proper advice to the operative part of the business. All the other instruments don't have that clarity and turn assessments into a legal odyssey.

## 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.

No.

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

No.