Contribution ID: 17b3c8bb-8e9c-4e4e-b602-3810b17bf363
Date: 20/12/2018 12:41:09

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.
- [x] **Public -** Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

- [x] *I agree with the personal data protection provisions.

Stakeholder's profile

1. You are replying:

- [ ] As an individual in your personal capacity
- [x] 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

CLECAT

6. a) Type of organization:

- [ ] Company
- [ ] Professional consultancy, law firm, self-employed lawyer/consultant
- [ ] Research and academia
- [x] 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?

- [x] 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

CLECAT, the European Association for Forwarding, Transport, Logistics and Customs Services, represents national federations of European multinational, medium and small freight forwarders, logistics operators and customs agents.

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
- [x] No

10. b) Please explain.

1000 character(s) maximum

The BER provides the shipping industry with a compliance tool which according to the shipping lines is 'fit for purpose' and with little ambiguity. However, CLECAT is concerned that the block exemption has not been closely adhered to in recent years. As carriers do not limit their services to port-to-port services, they also exchange data on services which relate to the land side of the maritime supply chain. The impact of the ongoing vertical and horizontal integration is that the relevant market is no longer a port-to-port maritime transport service but rather a door-to-door service. The joint operations and exchange of information can provide alliances with opportunities to collude as they provide carriers with insights on the cost structures of their competitors. This is no longer restricted to the sea-leg of the maritime supply chain and therefore should not provide carriers with a free-pass to collaborate.

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				●		
Market share calculation				●		
Exchange of information					●	
Capacity adjustments in response to fluctuations in supply and demand		●				
The concept of highly integrated consortia					●	
Overall compliance with competition law					●	

The right to withdraw and notice period for members' exit from consortia	○	○	○	○	○	○

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

1000 character(s) maximum

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	○	○	○	○	○	○
Article 101 (3) TFEU Guidelines	○	○	○	○	○	○
Specialisation BER	○	○	○	○	○	○
EC decisional practice	○	○	○	○	○	○
Other	○	○	○	○	○	○

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

1000 character(s) maximum

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

- [x] Yes
- [ ] No

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

1000 character(s) maximum

The newest generation of alliances is associated with declining weekly service frequencies and less direct port-to-port connections. Overall the recent developments in liner shipping have led to less market choice (only three alliances), lack of competition (utilisation of the same vessels and fewer carriers) and less visibility. This trend is with some detail described in the recent ITF report on the impact of alliances. CLECAT's members support the conclusions of the ITF report and have contributed to the study through in-depth interviews.

Suspicion has been expressed that carriers are using their positions within integrated logistics groups to undercut forwarders, by charging demurrage to merchants who arrange the transport in merchant haulage but waive the charge for merchants for which they arrange the transport in carrier haulage. Shipping lines are discouraging merchant haulage, thereby reducing competition and choice.

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

- [x] Yes
- [ ] No

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

1000 character(s) maximum

There is limited competition between individual lines on price because everyone can offer their customers the same undifferentiated service, whether on their ships and in their ports and terminals or those of some other lines inside or outside a consortium.
As noted, shipping lines are discouraging merchant haulage, hence reducing competition and choice of services.

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

- [ ] Yes
- [x] No

15. b) Please explain.

1000 character(s) maximum

In an ambition to get volumes there is some competition in price but this is very limited as there is not much on which carriers can compete because service levels are also more or less equal (cargo is loaded on own vessels or on vessels of alliance members).

Freight charges are a relatively small element of the total shipping costs. Allowing for the plethora of additional fees and surcharges supports the view is that the carriers are not competing on cost or service levels.

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

For carriers to respond

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?

- [x] Yes
- [ ] No

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

1000 character(s) maximum

For carriers to respond

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

- Market consolidation
- Reduction in meaningful choice
- Lack of real competition on either price or service
- The carrier's inability to balance supply and demand resulting in rate volatility
- Increasing overreliance on ULCV's
- Poor service levels and schedule reliability
- The lines using global systems have become over reliant on IT
- Lack of accountability by carriers in a commercial/legal sense in particular with regards to bill of ladings and invoices
- Carriers seeking to become integrated service providers

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	○	○	○	●	○	○
Number of carriers operating outside consortia	○	○	○	●	○	○
Number of members in individual consortium	○	○	○	○	●	○
Capacity deployed by individual consortia	●	○	○	○	○	○
Number of ports served by consortia	○	○	○	●	○	○

19. b) Please explain.

1000 character(s) maximum

Changes are partly dependent on the trade lane but this is the general trend.

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.

1000 character(s) maximum

Data on rate developments, choice of service, quality/reliability of services is available in economic/market research reports from Drewry, Alphaliners, SeaIntel, Lloyds etc.

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

- [x] Yes
- [ ] No

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

250 character(s) maximum

Joint purchasing of services (see question 22)

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

- [x] Yes
- [ ] No

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

1000 character(s) maximum

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

23. b) Global or industry effects

1000 character(s) maximum

CLECAT recognises that alliances and ULCV are here to stay. However, the extent to which carriers can exchange data which have an impact on competition should be restricted by means of a legal instrument. Freight forwarders would benefit from better services, more transparent rating in particular on the surcharges and earlier notices. This would allow them to offer better service quality to their shipper clients.

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
- [x] No

24. b) Please explain.

1000 character(s) maximum

This is consistent with the EC's policy of phasing out all sector-specific block exemptions and we see this as logical next step for the Commission in line with this policy. It has therefore been part of DG Competition's general policy over the last few years to subject the transport sector to the same rules that apply to other sectors.

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
- [x] No

25. b) Please explain.

1000 character(s) maximum

No as the Consortia BER is sector specific

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
- [x] No

26. b) Please explain.

1000 character(s) maximum

Consortia have been acceptable to freight forwarders in the past provided they could demonstrate benefits to shippers in terms of reduced costs and enhanced efficiency. Such horizontal agreements between competitors must be strictly governed by competition law in order to ensure operational and technical co-operation does not become anti-competitive through an excessive market share and dominance on any particular trade lane or specific market. In view of consolidation and concentration in the industry, CLECAT is concerned that the BER has not been closely adhered to in recent years.

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

CLECAT maintains that consortia represent a legitimate business mechanism for otherwise competing liner shipping companies to improve their offer. CLECAT reiterates that a BER is not necessary and reduces competition by giving carriers a free pass to reduce service offerings. We would therefore urge that it is not renewed and that consortia are treated under the same general competition legislation as other business interests.

Carriers operate often in direct competition with freight forwarders as they increasingly extend their service into freight forwarding activities. As many carriers are to some extent state subsidised (whereas forwarders are not) the question is raised as to whether the shipping lines have a competitive advantage when purchasing a forwarder and how to ensure that subsidies are not diverted to support their forwarding activities. Therefore, in case the BER is renewed, the scope of exempted activities should be limited and clearly defined.

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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