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.

- [x] **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 All other personal details (name, organisation name and size, transparency register number) will not be published.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.
- [x] *I agree with the personal data protection provisions.

4. a) Country of residence

Europe.

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

Ship Owners and Managers.

Section 1: Effectiveness

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

No.

10. b) Please explain.

To answer this question appropriately, two aspects of cooperation should be distinguished: First, the joint charter of tonnage capacity by consortia members. Second, the joint provision of liner shipping services by the consortia.

The Consortia Block Exemption Regulation ("BER") generally appears to provide legal certainty with regard to the second aspect. However, there are downsides resulting from the current practice (see sub 13b)). With regard to the first aspect, the BER does not provide sufficient legal certainty:

In 50% of the cases, liner shipping companies do not own the vessels they use for shipping but procure them from companies who charter out their vessel capacity ("tonnage providers"). Consortia members appear to interpret the Consortia BER as allowing coordinated or joint purchases/charters from tonnage providers. In our view, Article 3 No. 4 of the BER does not sufficiently clearly deal with this kind of coordination, thereby causing harmful effects to competition, quality and sustainability of the product offer.

The BER is explicitly meant to enable liner shipping companies to coordinate their services in order to improve the productivity and quality of available liner shipping services by reason of the rationalization they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilization of port facilities, promotion of technical and economic progress by facilitating and encouraging greater utilization of containers and more efficient use of vessel capacity (para. 5 of the BER).

The BER contains provisions that allow for certain kinds of coordination:

Article 3.1b and Article 3.1c of the Consortia BER basically allow liner companies to jointly use their chartered capacities.

Article 3.4b furthermore gives a consortium the right to implement "*an obligation on members of a consortium to use […] vessels allocated to the consortium*". Upon careful reading, the provision relates to vessels that either (i) have already been chartered to consortia members or (ii) belong to consortia members. Both alternatives do not rule on a joint purchasing or joint chartering of tonnage provider vessels.

The BER provisions are meant to help liner companies to make efficient use of their existing resources but have resulted in an oligopsony used against tonnage providers and other stakeholders along the chain of value in transportation. This finding is supported by the **Report of the International Transport Forum in cooperation with the OECD "The Impact of Alliances in Container Shipping"**, published in November 2018 (see here). Liner companies engaging in consortia have extensively coordinated their chartering activities (even though never officially declared to outsiders) during the past decade without a single known case during which this practice was challenged by authorities. In addition, the beginning of

Article 3(4) of the BER provides that "any other activity ancillary to those referred to in points 1, 2 and 3 which is necessary for the implementation" is exempt from the prohibition of the former Article 81(1) TFEU (now: Article 101(1)). It appears unfortunately not to be sufficiently clear to what extent joint purchasing by a consortium falls under the BER:

In paras. 109 et seq. of its Working Paper of DG IV: Report on Commission Regulation No 870/95 of 28 January 1999, the Commission found that "joint buying may fall within the scope of Article 85(1)". Therefore, the Commission considered it "reasonable" that the BER covered the joint purchase of port terminals and related services. The crucial criterion to assess whether joint purchasing is covered by the BER is whether it is necessary to achieve the efficiencies the BER aims at. In that context, the Commission also stated that the joint purchase of feeder vessels "*does not seem generally to be necessary for the joint operation of a maritime service by a consortium*" and therefore "*would require individual exemption*" (para. 110 of the Working Paper).

The coordinated charter of tonnage capacity by groups of liner shipping companies covering up to 30% of the worldwide market is certainly not necessary to create, operate or maintain a consortium for liner shipping services. Furthermore – and even if it would be covered by the BER – such joint charter leads to a number of harmful effects for the market for tonnage provision (see sub 13b)).

The emerging effects are not covered by explicit anti-abuse provisions in the BER. Article 4.3 ("*The exemption [...] shall not apply to a consortium which [...] has as its object [...] the allocation of markets or customers*") as "*hard restriction*" does not help to clarify the relationship between liner companies and tonnage providers. It only protects customers of the consortia.

In addition to the existing lack of clarity regarding joint purchasing or chartering activities, liner shippers and tonnage providers cannot rely on much decisional market definition practice with regard to tonnage provision. Depending on the definition of product and geographical markets for tonnage provision, the conditions to qualify as an exempted consortium as per Article 5.1 and Article 5.2 can be easily met: the 30% market share threshold is extremely high.

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.

- Market definition: Intermediate.
  Explanation: To the extent this can technically be distinguished – which we consider appropriate – our evaluation here refers primarily to the first aspect set out above. How to apply the market share threshold of the liner shipping services market when it comes to joint charter activities is unclear. If the BER is interpreted to allow for joint capacity purchases/joint charters at all, it would be reasonable to take into account the markets for such services. However, as pointed out above, there is no reliable decisional market definition practice yet with regard to such services. Neither does the BER provide any help on how to define these markets. Rather, the word "market" as used e.g. in para 9 and 10 of the introduction and in Article 5.1 and Article 5.2 suggests that the market for liner shipping services (i.e. the downstream market) is taken into account only to assess tonnage sourcing activities.
  However, even the definition of the market for liner shipping services appears soft and without precise limits and as such gives a lot of flexibility to its interpretation. The BER provides liner companies with the possibility to define product and geographical markets in a way that they fall under the exemption threshold, by the choice between goods carried or with regard to 20-foot equivalent units. The definition of the relevant geographic market is not set out in the BER at all.
- Calculation of market share: Intermediate.
  Explanation: Given that the calculation mechanism depends on the definition of the relevant market, there seems to be a lot of interpretation headroom as to which market shall be used for the calculation.
- Information exchange: Intermediate.
  Explanation: Article 3.4a appears to provide a high degree of legal certainty. However, as the scope of activities to be coordinated is not sufficiently clearly defined, liner companies in the end do not have legal certainty as to which activities an exchange of information can legitimately refer to.
- Capacity adjustments: High.
  Explanation: Article 3.2 provides a high degree of legal certainty to consortium members.
- Highly integrated consortia: High.
  Explanation: Para 11 of the introduction and Article 6 of the Consortia BER provide highly integrated consortia with additional protection rights when compared to the already high legal security of less integrated consortia.
- Overall compliance with competition law: Intermediate.
  Explanation: Since the exemption is very broad, the legal certainty to comply with competition law is in principle high. However, many liner companies appear not to understand the limits of the BER correctly.
- Withdrawal from consortia: High.

Explanation: The consortia BER gives high flexibility to enter into contracts containing mechanisms ranging from weak to strong exit hurdles with the option of rather strong exit hurdles for highly integrated consortia.

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.

Not applicable.

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

Yes.

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

Joint charter of tonnage

We do not consider joint charter of tonnage to be covered by the BER. However, even if joint charter of tonnage was covered by the BER, this would have a significant negative impact on the overall market development and would ultimately result in additional costs for customers and consumers.

In para. 202 of its Horizontal Guidelines, the Commission has taken position with regard to the effect of joint purchasing: “If the parties have a significant degree of market power on the purchasing market (buying power) there is a risk that they may force suppliers to reduce the range or quality of products they produce, which may bring about restrictive effects on competition such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply”. The Commission has therefore set a threshold for such cooperation at 15%. The three big liner shipping consortia each have market shares of more than 15%, adding up together at almost 80%. The general observations of the Commission with regard to buying power are strongly supported by the current developments in the tonnage provision market:

The negotiation power of consortium members is significantly higher than that of independent liner companies, thereby keeping charter rates artificially low (the correlation between the percentage of ships unemployed and the development of charter rates significantly decreased over the last 10 years). Current charter rates are about 30% lower than historical charter rates in a similar positive economic environment. Consortia are able and tend to enforce extremely flexible charter periods (e.g. 1-24 months in charterers option), making it difficult for tonnage providers to obtain (competitive) financing, resulting in increased capital costs.

Finally, the economic pressure that the consortia members exert on tonnage providers results over time in an erosion of the viability of tonnage providers, to the benefit of tonnage providers from outside of the EU. This undermines the concept of sustainable provision of tonnage in the EU. It would be contradictory that the European Commission on the one hand approves policies (e.g. with regard to State aid) that aim at maintaining and strengthening existing tonnage in the EU, whereas it enables liner shippers at the same time to act at tonnage provider's cost.

In the long run, if selling below cost, tonnage providers in the EU are going to be substituted by tonnage providers from outside the EU. This will lead to dependencies from non-EU countries and can significantly raise the costs of end customers and consumers.

The margin that a coordinated purchasing might add to the members of consortia is therefore at the detriment of end customers and consumers and therefore cannot fulfill the requirements under Article 101(3) TFEU.

Negative impact of pooling vessel capacity in consortia as such

In its **Report "The Impact of Alliances in Container Shipping"** of November 2018 (cf. above), the **International Transport Forum** has assessed the various effects of consortia on the transport value chain and has come to the conclusion: "*The impacts of alliances on the containerised transport system taken as a whole seem to be predominantly negative*" (p. 19 of the Report). We can support some of the observations made in the report from our own experience:

As a factual observation, consortia support upsizing in tonnage of the respective chartered vessels. This results in a loss of variety in ship sizes of the operating fleets. Bigger ships can only make use of their economies of scale if highly utilized. In many cases, no appropriate degree of utilization is reached. The demand for bigger, newer ships is faster than the sum of increase of capacity demand and consumption of older (smaller) ships. The result comes at the expense of smaller ships, thereby reducing efficiency of overall tonnage used in the market (high number of ships idle, laid-up, scrapped or not fully utilized). Also, the use of ever bigger ships results in port congestion, requires expensive upgrading of port infrastructure (costs are forwarded to customers and end consumers), and operating at lower sailing frequency and on longer routes with more port calls (and as such lower likelihood to meet the schedule).

Moreover, the pooling of vessel capacity by consortia leads to a lack of quality awareness of the respective consortium members, thereby deteriorating the quality of vessels in the overall market. Consortia mostly have no quality criteria with regard to the tonnage capacities to be contributed. As members of consortia share the chartered tonnage capacity, they have no incentive to compete with regard to ship-related factors. Accordingly, members of consortia do not aim to differentiate themselves from each other by vessel quality: There is no competition on other factors such as reliability, service speed, environmental protection etc. as all services are being carried out on the same ships e.g. via slot sharing agreements.

A consortium member has little economic incentive to purchase or charter in a high quality ship (lower consumption, higher maintenance standard etc.) because the consortium member does not know whether it will transport its containers on this more reliable ship or on a less reliable ship chartered in by its partners. The consortium member is required by the consortium to provide a certain number of ships and this is all it does. As a result, the cheaper the contributed vessel is, the better the economic outcome of the consortium equation for the individual consortium member. As a side-effect, for existing quality providers, this results in high quality tonnage no longer earning a premium over its peers.

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

Yes.

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

New ultra large ships require high investments, compete with subsidized ships from Asian state owned entities and are often only utilized to a lower degree than smaller ships. These ultra large ships only emerged together with the big alliances, as single members could barely make efficient use of this kind of tonnage before. The alliances have made a big portion of smaller ships redundant. This has effects not only on tonnage providers but also on the liner shipping markets: Without smaller ships and the respective tonnage providers of same, new liner companies cannot easily emerge anymore, as the tonnage available for chartering disappears in the long-run. Competition in liner shipping becomes increasingly subject to high entry barriers. As a consequence, if the current market development continues, competition will decrease in the future as it would require significant capital expenses for new participants to enter the market as there are no longer enough ships available for chartering.

If existing smaller unemployed tonnage would be chartered in, the fuel oil consumption of the ships could be reduced significantly without reducing service frequency. However, consortium members with bigger sized tonnage cannot employ their ships in a trade together with smaller sized tonnage (which would be chartered in).

As such, instead of flexibly reacting to actual demand, consortium members are constrained to utilizing their capital expensive own tonnage even if this is less efficient. By this, the overall market becomes more static and services are partially based on the availability of consortium owned tonnage and not based on customers' demand. Again, this comes at the expense of the customers and end consumers.

Since tonnage providers cannot compete with the low financing costs of consortium members and also there are only very few charterers for bigger sized tonnage, there are significantly less competitors active on the charter market for bigger sized tonnage than for the market for smaller sized tonnage and there is less competition. This process can lead to the tonnage market being split into one for ultra large vessels and one for medium/small vessels, vertically integrated consortia taking a large share of the first one for themselves.

In addition to the aforementioned, ship owners from outside the EU, especially from Asia can offer their container tonnage cheaper than owners from the EU. Most EU based owners employ officers from the EU (e.g. Bulgaria, Romania, Croatia, Poland, Baltic states) with a higher pay in Euro wages (shipping is normally in USD). Further, the owners from Asia mostly sail their ships without any bona fide agreement with any union and below the EU normal standards. If this chartering practices of the oligopols continue, many EU ship owners will turn to other more rewarding shipping segments where there is still a variety of customers with healthy competition (e.g. bulk). Then the tonnage supply to the liner oligopol will be left to cheaper operating owners from Asia. Ultimately reliability of the services will decrease and affect the final customers. Officers from the EU have to accept lower paid jobs of Asian owners.

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

No.

15. b) Please explain.

In economic relationships between consortia and tonnage providers, this appears often not to be the case. Our impression is that consortium members discuss their chartering needs amongst each other. If a consortium of e.g. three members has a charter requirement for say 3 x 5,000 TEU ships (which it cannot fulfill with existing tonnage of its own members), the respective members will not try to serve their demand individually. The consortium (via one of its members) will typically only tender out one vessel requirement first and only disclose the demand for the second and third vessel once the preceding requirements are fulfilled. That way, the consortium members would no longer need to compete against each other in terms of purchase pricing.

As to competition on services, please see answer to question 13b.

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.

As tonnage provider we do not engage in consortia and as such cannot assess the costs incurred in connection with complying with Consortia BER. However, it can be assumed that the (unclear) application of the Consortia BER to joint chartering leads to consortia members assessing the criteria of the Consortia BER more often that they would have to, thereby resulting in costs for the consortia members and even in a risk of being subject to administrative fines or damages actions if they are found guilty of an antitrust violation.

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?

No.

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

We consider the the economic relationship between tonnage providers and liner companies already now to be out of the scope of the Consortia BER, so that general antitrust provisions apply. If this state would be clarified – be it explicitly or by non-prolongation of the BER – the liner companies would have even less effort to find the correct legal solution.

Moreover, the Consortia BER is being dealt with far less frequently than general antitrust provisions. As such, assessments of the Consortia BER can rely on less decisional practice and are more difficult to undergo than “ordinary” antitrust assessments, which raises not only the risk of non-compliance but also the cost of compliance.

Section 3: Relevance

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

- Increase of tonnage size.
- Increase of concentration level (merger and acquisition activity).
- Increase in debt level of liner companies.
- Increase in market share of top alliances and top liner companies.
- Bankruptcies of smaller shipowners and overleveraged liner companies.
- Decrease of charter rates.
- Decrease of maintenance standards of global fleet.
- Decrease of carrier reliability.
- Decrease of charter periods with increasing financial uncertainty of smaller tonnage providers and shrinking opportunities to obtain bank loans for newbuilding projects which usually require a medium to longterm charter.

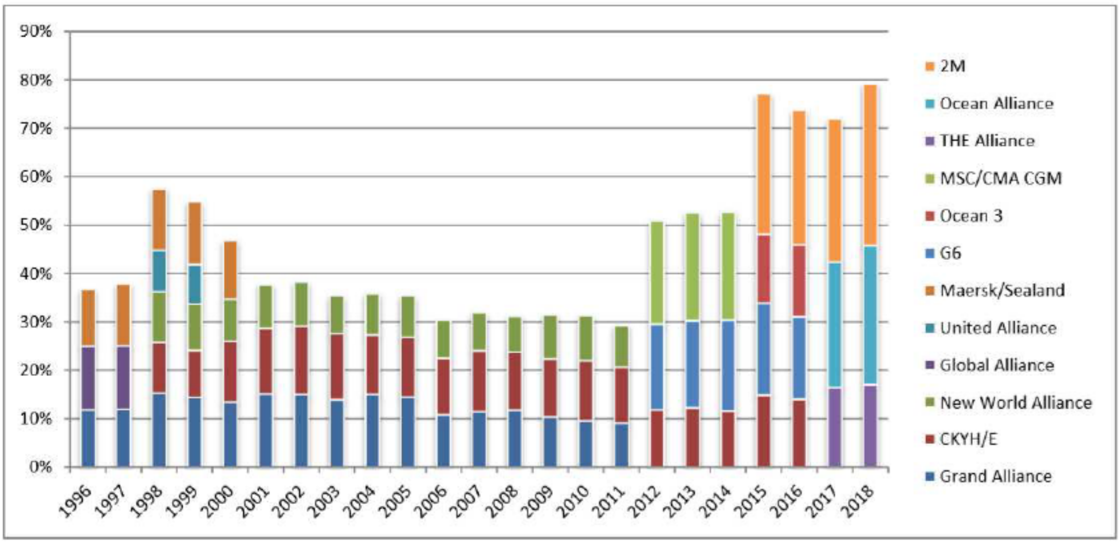
19. a) Have you noticed any or more of the following changes to the consortia landscape in the past 5 years:

	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.

Consortia over the last years have significantly increased in size. While from 2008-2011 the three biggest alliances accounted for about 30% of container capacity and from 2012-2014 the three biggest alliances accounted for about 50% of container capacity, in 2018 the three biggest alliances accounted for about 80% of container capacity. As such, consortia have become a means to control the market rather than enable consortium members to remain competitive against superior competitors.

Figure 1. **Global market share (container carrying capacity) of global alliances (1996-2018)**



Source: ITF Report **"The Impact of Alliances in Container Shipping"** of November 2018 (cf. above), p. 19

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.

- Prices: See 15.b and 16; please note that charter rates have significantly decreased.
- Choice of Services: See 13.b and 14.b. (less choice of services)
- Quality of Services: See 13.b and 14.b. (lower quality of services)

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

As pointed out above, we consider the joint tonnage capacity charter as not covered by the BER.

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

As pointed out above, we consider this practice to cover approximately 50% of the consortia tonnage, consortia covering approximately 80% of the worldwide container carrying market.

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

Yes, cf. above.

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

Carriers cooperate to a significant degree in the joint charter of tonnage (we estimate this practice to cover approx. 50% of the market, cf. above). Furthermore, we observe an increasing share of big consortia or their members into feeder services, increasing their market penetration.

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

We would expect competition and efficiency in shipping to increase. Liner companies would still be big enough to compete since their market share and sheer size is still significant:

Table 1. **Overview of the three global alliances in container shipping (June 2018)**

Alliance	Carriers	Global market share (%)	Global carrier rank
2M	Maersk	19	1
	MSC	15	2
Ocean Alliance	Cosco-OOCL	12	3
	CMA CGM	12	4
	Evergreen	5	7
THE Alliance	Hapag-Lloyd	7	5
	ONE	7	6
	Yang Ming	3	8

Note: Global market share indicates the share of global container carrying capacity of the carrier
Source: Own elaborations based on data from Alphaliner (2018)

Source: ITF Report **"The Impact of Alliances in Container Shipping"** of November 2018 (cf. above), p. 14

It would be beneficial if smaller carriers could still form alliances. However, the market share threshold of the Horizontal Guidelines (15%) appears more than sufficient for coordinated purchasing of vessel capacity and the basis on which such threshold is calculated should be clearly defined (e.g. alliance partners together may not own or charter-in directly or via affiliated parties, whether within or outside the scope of the consortium, more than 15% of total container capacity). New market participants could more easily enter the market as the negotiation power of the three big consortia would be reduced back to normal. Instead of basically only having three customers for 80% of their tonnage, tonnage providers would immediately serve at least eight customers for 80% of their tonnage, thereby more than doubling competition.

We would expect liquidity in the market to increase, capacity to adapt to demand, and thus idling time of tonnage to decrease sustainability of tonnage provision to improve. Together with improving sustainability, we would expect demand for quality to increase and that ships would consume less fuel oil. Due to the lower fuel oil consumption, we would expect that there will be no price impact on consumers from such a change (as the decreasing fuel surcharges will off-set the increasing charter rates), however, there should be a positive impact on quality and variety of services.

23. a) Effects on your organization

If the application of the Consortia BER to joint purchasing of tonnage capacity would stop, we would expect more quality-based competition and as such we would expect our customer base to diversify. As a result, we would be less dependent on a small number of customers and would be exposed to less risk. We would expect that we could engage in more long-term contracts with liner companies. Overall, we would expect our business to become more sustainable and allowing to further improve the quality of our and other ships in the EU.

The complete non-prolongation of the BER would ensure this effect even more certainly.

23. b) Global or industry effects

See 23 and 23a.

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?

No.

24. b) Please explain.

The degree to coordinate liner services to achieve the intended efficiencies is difficult for us to tell. However, we have no reason to assume that the threshold from which on efficiencies are possible in liner shipping are any different from other industries. At least with regard to purchasing “production capacity” – in that case: tonnage provision – does certainly not justify a different treatment than other sectors of the economy.

Moreover, the underlying assets of the business are highly mobile so any liner company that deems its assets are no longer optimally utilized is not only free to change its business model (as would be the case with any other business) but is also free to easily change the location of its business (as is rarely the case for any other industry). With the current Consortia BER, liner business have missed out on adapting their business model because they were protected by the sheer size of their consortia. As such, ultimately, the Consortia BER will not even be beneficial to the liner companies. The aim of the Consortia BER as per para 5 of its introduction was to “help to improve the productivity and quality of available liner shipping services” and “to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity” with this aim intended to be achieved by “the ability to make capacity adjustments in response to fluctuations in supply and demand”. As shown, during the past 10 years, neither was one of the aims actually achieved (at best the opposite did not occur) nor did we get any closer to build the basis for achieving these aims – the capital expensive big container ships which came along with the alliances are less flexible and face lower utilization.

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)?

No.

25. b) Please explain.

Paragraph 35 of the Horizontal Guidelines clearly identifies a risk that "*the parties may more easily coordinate market prices and output.*" Paragraph 36 of the horizontal guidelines further identifies that "*a horizontal co-operation […] can only allow the parties to more easily coordinate market prices and output […]*". This could, for instance, be the case, where they jointly manufacture or purchase an important intermediate product or jointly manufacture or distribute a high proportion of their total output of a final product.

We see these drawbacks with respect to purchase prices (i.e. charter rates) where a high degree of coordination among consortia and consortia participants allows them to jointly purchase the goods (i.e. charter in ships) and jointly distribute the output (i.e. sell container slots). This coordinated behavior has resulted in charter rates that are repetitively and continuously below the costs of the providers. Ultimately, even clearing the market by extensive scrapping of tonnage has not altered this situation but only raised the question of how environmentally sustainable a business is where ships as young as 7 years of age (as it was the case in 2016/2017) are being scrapped because liner companies did not want to pay a charter rate that would at least cover the operating expenses of these ships.

As per para. 49 of the horizontal guidelines, "*the application of the exception rule […] is subject to four cumulative conditions*":

— the agreement must […] lead to efficiency gains;

— the restrictions must be indispensable to the attainment […] the efficiency gains;

— consumers must receive a fair share of the resulting benefits […]; and

— the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

We do not see that the BER for consortia has led to a higher efficiency of the market. The number of market participants in the liner industry has decreased dramatically over the last years. We have seen the consortia members ordering ships in numbers the market cannot absorb. While the efficiency on an individual vessel might have improved it definitely has not done so on the container fleet as a whole given the high number of idling vessels. Under no circumstances is the BER indispensable for the attainment of any efficiency gain. Further, the BER has been a contributing factor to damage competition on the market of vessel providers due the monopsonistic market power brought about by the BER to the consortia members.

We do not see sufficient decisional practice that deals with these criteria with regard to liner shipping. Rather, it appears as if the industry as a whole has been exempt from Article 101(1) TFEU. This is not consistent with the approach taken in other industries. Neither is it justified by the crucial role transportation plays for the internal market – quite the contrary: As competition is a structural means to strengthen markets, a critical field such as transportation should not foresee indistinct exemptions of vague applicability and harmful effects.

Structurally, the BER deviates from the Horizontal BER in that activities considered “ancillary” services to transportation are not necessarily assessed seriously with regard to their own characteristics and competitive dynamics, but only under the criterion of being “necessary” for the provision of liner shipping services. In the Horizontal BER, joint purchasing is covered by an entire chapter (Chapter 5). Whether (i) the market definition with regard to liner shipping, (ii) the market share threshold defined to achieve efficiencies in liner shipping can be reasonably applied to such activities can be doubted. Therefore, the Consortia BER should either not be prolonged or clarified in order to express to what extent it covers the provision of tonnage and other “ancillary” services.

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.

26. b) Please explain.

The Consortia BER provides a comparably clear legal environment in which it is easy for liner companies to engage in consortia. As such, it provides added value with respect to the compatibility of assessments. The added value lies in the degree of detail in which the BER spells out typical situations occurring in liner shipping. This is at the same time the downside: The generalized application to “ancillary activities” does not sufficiently discuss and take into account the specifics of the business and of competition.

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.

The companies that are tonnage providers to consortia members are to a great extent medium and even smaller sized companies located in many countries of the European Union. The development of an oligopsony on the charter market for container vessels puts this industry in danger. The more so since the consortia members create some kind of monopsony in certain markets. In some instances we are faced with highly coordinated chartering strategies which we did not have some years ago when there were more players on the demand side. We consider it highly doubtful that these practices are covered by the Consortia BER but see a risk that the consortia members consider them to be so.

Container tonnage providing companies generally create above average paid employment for specialized employees not only in the big port cities but also in smaller cities. All this is endangered by the current development of market concentration brought about by the consortia.