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
- (x) 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

FEPORT : The European Federation of Private Port Companies and Terminals

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
- [x] 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

Since 1993, FEPORT represents the interests of large variety of terminal operators and stevedoring companies performing operations over 400 terminals in the seaports of the European Union. FEPORT speaks on behalf more than 1200 companies.

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

In its current version, the Consortia BER does not provide sufficient legal certainty for some actors of the logitics chain ie terminal operators. Since the renewal of the Consortia BER in 2009, many market developements have occured and have led to an important consolidation within the liner shipping industry. Moreover, the increased use of data by shipping lines to propose door to door services (data mining and business intelligence) is leading to a situation where shipping lines are actually competing with other actors who do not benefit from exemptions. Last, vertical integration of terminals by carriers is increasing and somehow distorting the competition between shipping lines offering carrier haulage & door to door services (ie relying on dedicated terminals) & other actors offering merchant haulage using all types of terminals. Legal certainty can be improved by clarifying that the exchange of information beyond the shipping leg is excluded from the scope of the exemption.

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

We believe that there is a need to provide an updated definition of what is a market https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3AI26073 as the level of consolidation which characterizes the liner shipping industry as well its complex structure shows that the 30% threshold is not anymore valid. Besides, shipping lines are active in several markets both horizontally and vertically and compete with other actors of the logistics chain beyond the shipping leg.

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

This question is more relevant for carriers or DG Competition.

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

There is a very large number of consortia agreements as the Regulation allows their conclusion quite easily. Wether they are benefiting to customers is a question for shippers and freight forwarders. What can be noted though is that the impact on ports and port service providers which has unfortunately not been taken into account in previous reviews of Consortia Regulation is quite significant. Particularly when cumulating with the increase in size of ships reaching now 24 000 TEU and the effect of mergers and acquisitions in the Liner industry. Blank sailings, delays, peaks in port operations, less calls in ports, increased market power for liner shipping to the detriment of their service providers as well as under utilization of port capacities due to less calls in some ports are among the recent developments which must be taken into account.

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

- [ ] Yes
- [x] No

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

1000 character(s) maximum

Consortia might be useful from the perspective of the lines.

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

We do not know. This is a good question to be raised to lines which are vertically integrated to terminals and which have consortia agreements.

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

We do not know as not relevant for port operators.

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

We do not know as not relevant for port operators.

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

The top four carriers accounted for 60% of the global container shipping market in 2018. The market share of the biggest carrier (19%) is larger than the market share of any global liner alliance before 2012, which shows the level of consolidation of the industry. More important concentration of Port networks, bigger cargo shifts from one port to another when lines forming alliances change port networks and underutilisation of public infrastructure. Within ports, as a result of consolidation and the use of consortia agreements, the buying power of the carriers has become huge thus leading to destructive competition between terminal operators.This lowers the rates of return on investment for port operators and in many peaks of activity followed by periods of unemployments for port workers, It also results in the decline of smaller container ports and the disappearance of smaller independent terminal
operators,

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

It would be important that DG Competition gets the data about the reality of the respect of the thresholds by the carriers. Nobody is really monitoring the capacities or whether an alliance is actually exceeding the 30% threshold of the Consortia BER. This is also true for the utilization rates of the ships in different alliances.

That said, although it would of course be better to have market shares based on actual transport volumes rather than capacity, that should not detract from the fact that liner shipping markets have become so concentrated that it is difficult to know what are the actual market shares except for regulators.

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

Not relevant for port operators.

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

Bulk shipping pools: joint ventures between shipowners to pool vessels of similar types , with central administration, which are marketed as a single entity..." . Consortia outside the BER ie applying for individual exemptions.

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

The last version of the BER stipulates that the joint purchasing of port services is possible while it is not in other areas of the world eg: US. Given the high level of concentration and consolidation, this provision has become problematic for port services and weakens their capacity to really negotiate with carriers. Today, the reality of the discussion between the carriers (alliances) and their service providers is very unbalanced as there is a significant risk for port services who really want to negotiate with carriers their prices to loose all members of an alliance as customers in case of disagreement.

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

We do not know but consider in principle that it is always better to have legal certainty through an enhanced BER taking into account all effects the Regulation may have on the logistics chain.

23. b) Global or industry effects

1000 character(s) maximum

It is difficult to assess the effect of one Regulation as there are many instruments used : Mergers and acquisitions, JVs, other types of agreements etc...

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

A comparison with other industries might be useful.

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
- [ ] No

25. b) Please explain.

1000 character(s) maximum

We assume that the answer is yes.

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
- [ ] No

26. b) Please explain.

1000 character(s) maximum

The Consortia BER has added value with respect to the clarifications of the applicable rules to Liner shipping and its interaction with other parties of the logistics chain. The General rules would be too general and would not tackle the current developments in the wider maritime sector.This is why the recurrent review by DG Comp of the instrument taking into account market developments in Liner shipping and their impact on other industries is essential to update the text and to avoid detrimental effects to other actors of the logistics chain.

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

The review of the Consortia offers a good opportunity to assess its impact beyond the shipping leg as the shipping industry itself is not restricting its service to the shipping market only but more and more competing with actors who offer door to door services. Hence, the importance to take into account the way and purpose for which consortia use data and also explicitely mention what consortia can do when they jointly purchase or use terminal capacities. ie clarifying/restricting the scope of the exempted agreements.

ITF report on the impact of Mega ships
https://www.itf-oecd.org/sites/default/files/docs/15cspa_mega-ships.pdf
ITF report on efficent sharing of information
https://www.itf-oecd.org/information-sharing-maritime-logistics
ITF report on the impact of alliances
https://www.itf-oecd.org/impact-alliances-container-shipping

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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