

# 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  
Marjorie
3. Last name  
Holmes
4. a) Country of residence

<input type="checkbox"/> Austria	<input type="checkbox"/> Czech Republic
<input type="checkbox"/> Belgium	<input type="checkbox"/> Denmark
<input type="checkbox"/> Bulgaria	<input type="checkbox"/> Estonia
<input type="checkbox"/> Croatia	<input type="checkbox"/> Finland
<input type="checkbox"/> Cyprus	<input type="checkbox"/> France

- |                                      |  |
|--------------------------------------|--|
| <input type="checkbox"/> Germany     | <input type="checkbox"/> Other                     |
| <input type="checkbox"/> Greece      | <input type="checkbox"/> Poland                    |
| <input type="checkbox"/> Hungary     | <input type="checkbox"/> Portugal                  |
| <input type="checkbox"/> Ireland     | <input type="checkbox"/> Romania                   |
| <input type="checkbox"/> Italy       | <input type="checkbox"/> Slovak Republic           |
| <input type="checkbox"/> Latvia      | <input type="checkbox"/> Slovenia                  |
| <input type="checkbox"/> Lithuania   | <input type="checkbox"/> Spain                     |
| <input type="checkbox"/> Luxembourg  | <input type="checkbox"/> Sweden                    |
| <input type="checkbox"/> Malta       | <input checked="" type="checkbox"/> United Kingdom |
| <input type="checkbox"/> Netherlands |  |

- b) If Other, please specify which country:  
Whilst Reed Smith London office is responding to this questionnaire, we have clients all over the world who trade into and out Europe. Shipping contracts often include English law, so Reed Smith has developed a strong sector knowledge.

5. Name of organization  
Reed Smith LLP

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

- b) If Other, please specify type of your organization:  
Click or tap here to enter text.

7. a) Type of company:
- ☐ Carrier
  - ☐ Shipper
  - ☐ Freight-forwarding company
  - ☐ Logistics company
  - ☐ Port authority or port services provider
  - ☐ Other

- b) If Other, please specify which type of company:  
Click or tap here to enter text.

8. Is your organisation included in the Transparency Register?
- ☐ Yes
  - ☒ No

If your organisation is not registered, we invite you to register here, although it is not compulsory to be registered to reply to this consultation. [Why a transparency register?](#)

9. Please describe the activities of your organisation.  
*250 character(s) maximum*

Reed Smith is a global law firm with more than 1700 lawyers in 28 offices in the United States, Europe, Asia and the Middle East. It represents leading international businesses and is advisor to several industries, including shipping and transport.

## Section 1: Effectiveness

Consortia are cooperation agreements between carriers and, where concluded between competitors, may potentially fall under Article 101 TFEU. Carriers are therefore required to assess whether their cooperation agreements are compliant with Article 101 TFEU. For that purpose, the Consortia BER may provide guidance.

10. a) Do you consider that the Consortia BER provides high level of legal certainty?  
☒ Yes  
☐ No
- b) Please explain.

The block exemption confirms that ship cooperation for international liner carriage is acceptable if certain conditions are complied with. The exemption as clarified by subsequent Commission working papers (see below) give a good level of legal certainty.

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="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Market share calculation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Exchange of information	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Capacity adjustments in response to fluctuations in supply and demand	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The concept of highly integrated consortia	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Overall compliance with competition law	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The right to withdraw and notice period for members' exit from consortia	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

- b) Please explain the reasons for your rating.  
*1000 character(s) maximum*

The block exemption at Article 5 refers to goods “carried in freight tonnes or 20-foot equivalent units”. It does not make clear that for the purposes of the regulation you calculate the market share in each direction and combine the two directions for the total market share.

This was confirmed later in correspondence to the lines and in the Commission Working Papers:

((1) Communication by the Commission: Report on the possibility of a group exemption for consortia agreements in liner shipping – COM 90 (260) final, 18 June 1990;

(2) Working Paper of DGIV: Report on Commission Regulation No 870/95, Liner Shipping Consortia (28 January 1999);

(3) Technical Paper on the revision of Commission Regulation 823/2000 dated October 2008).

Market share calculation is based on volumes as clearly set out in Article 5 of the CBER. This differs from the Maritime guidelines (OJC 245,26.9 2008) which allowed a wider approach to how to calculate market share, such as capacity, value of cargo or number of charters with respect to tramp shipping.

The use of capacity rather than volumes to calculate market share would be easier for the carriers as this information is more publically available.

The container product market is twenty-foot containers provided the percentage of reefers (refrigerated containers) are not more than 10%. Where they are higher for example Australia/ North Europe the reefers may compete with conventional reefer ships.

The geographical market is based on trades, which are set out in Commission Working Papers and merger decisions.

Exchange of information is only covered by way of reference to “*any other activity ancillary*” in Article 3(4). It is understood that information exchange, which is necessary to operations, can be exchanged. Reference to specific documents such as baplie files or storage plans would be helpful, but any list must be flexible because what is necessary to exchange is very fact-specific. The horizontal guidelines set out examples of when information can and cannot be exchanged, but the type and level of detail is not addressed because it is fact-specific.

The concept of highly integrated consortia is set out in Whereas (3): “*Consortium agreements vary significantly ranging from those that are highly integrated, requiring a high level of investment for example due to the purchase or charter by their members of vessels specifically for the purpose of setting up the consortium and the setting up of joint operations centres*”.

The block exemption wording was amended in the past to make it clear that the lines could increase and decrease capacity within a consortium to respond to fluctuations in supply and demand. This is crucial to the running of a consortium. It is in nobody’s best interest to have ships sailing half-empty or for cargo carriage to be delayed due to lack of space.

The right to withdraw condition attached to the exemption is the clearly set out at Article 6.

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

b) Please explain the reasons for your rating.

1000 character(s) maximum

The Horizontal guidelines are useful, but there are no examples in there relating to ships – the examples relate to goods, insurance and banking, but not ships.

Moreover, according to introduction paragraph 18 of the Horizontal guidelines, they do not apply to the extent that sector specific rules apply, as it is the case for Transport.

The 101(3) guidelines are useful but the only example in there relating to ships refers to use of tariffs which is not relevant to consortia.

The Specialisation BER is not that helpful because Article 6 refers to the block exemption being most useful when the parties have complimentary skills and Article 7 refers to a party giving up manufacturing certain products. There is some joint distribution allowed under Article 4. Whilst consortia are joint production arrangements most of the wording does not fit the consortia lines position and practices. The parties never want to give up providing services.

Recent merger decisions are helpful insofar as they acknowledge competition within consortium based on customers' consultation during the merger review procedure and reconfirm the Commission's view of the market definition.

With respect to EC decisional practice, there has never been a case where DGComp have dealt with "a novel issue", under Regulation 1/2003. In the US, there is a "rule of reason" procedure to our self-assessments, but these are supported by the business review letter procedures, which are not available from DGComp. In any event, in the US common carriers are required to file their agreements in a highly regulated environment overseen by the Federal Maritime Commission (FMC)

In addition, in US there are many more private actions, which gives some degree of comfort as to what is allowed. In Europe we agree with Bellamy & Child that the Commission do not often consider 101(3) arguments in decision making – ***The Commission's decisional practice has been focused on anti-cartel enforcement in recent years and in such cases it has rejected the Application of Article 101(3) in brief terms: 'hard core cartels are, by definition, the most detrimental restrictions of competition, as they benefit only the participating suppliers but not consumers' In its decisions accepting commitments, however, the Commission has sometimes described amendments made to agreements in order to allay competition concerns perhaps, an insight into how it balances pro-and anti-competitive effects.***

The Non-opposition procedure exemptions given related to Consortia pre-2004 are helpful. They are useful in highlighting the importance of showing effective competition on the market including competition within a consortium as demonstrated by evidence of switching by customers, as well as the use of more than one line by customers in one consortium and fluctuations of market shares. They are becoming old, especially in relation to market definition and no actual decisions were published, just articles in the Commission Newsletter (see attached an example).

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

☐ Yes

☒ No

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

1000 character(s) maximum

Click or tap here to enter text.

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

- ☐ Yes  
☒ No

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

*1000 character(s) maximum*

Click or tap here to enter text.

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

b) Please explain.

*1000 character(s) maximum*

There is very heavy competition within a consortium as evidenced by the amount of switching by the shippers and freight forwarders from line to line, even within the same consortium.

In addition, where the carriage is point to point not port-to-port (sea leg only), the lines are providing different services on the non sea leg.

## Section 2: Efficiency

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16. Does the compliance with Consortia BER generate costs? Would you be able to quantify them (in absolute value as well as relative value, i.e. percentage of your annual turnover)? Please explain.

*1000 character(s) maximum*

Yes, compliance does generate cost, but without the block exemption, the costs of self-assessment would be considerably higher as the block exemption acknowledges the benefits of economies of scale and wider port range. The block exemption helps the lines convince other jurisdictions as the wording of the block exemption is simple and clear, which is not the case with respect to the Horizontal and Article 101(3) guidelines.

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

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

*1000 character(s) maximum*

Yes, costs would increase considerably; the need for both lawyers and economists would be increased and the costs of persuading other jurisdictions that consortia are still allowed would increase considerably.

## Section 3: Relevance

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

*1000 character(s) maximum*

Consolidation in the container shipping industry has reduced the number of lines, but our impression is that the number of trades the remaining lines serve has gone up .

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="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Number of carriers operating outside consortia	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Number of members in individual consortium	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Capacity deployed by individual consortia	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Number of ports served by consortia	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

- b) Please explain.

As lawyers rather than carriers, we have limited knowledge of the markets but from reading the press, carrying out merger filings and completing self assessments the impression that we have is provided above, but this relates to carriage by container and Reed Smith is conscious that the block exemption was extended to cover any cargo carriage by liner international services.

It was reported by DGComp in their technical paper of October 2008 that in response to a market investigation of the consortia regulation starting in 2007 that 30 carriers were sent questionnaires and 20 responded and provided a total of 92 agreements. This time the lines have been required to apply for a specific questionnaire, so Reed Smith would expect less response. We are aware of one carrier who assumed that only European carriers were allowed to comment on the exemption.

It remains the case that carriers need to retain" the flexibility necessary to change their agreements in response to changing competitive circumstances ". This was one of the reasons given for the original block exemption being introduced (see 5.4 of COM(900 260 final).

20. a) What were the effects of the developments you identified in response to 3.1 and 3.2 on competition in the liner shipping sector on:

	Significant increase	Moderate Increase	Stable	Moderate decrease	Significant decrease	Don't know
Prices	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Choice of services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Quality of services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

- b) Please explain.



Price is likely to have decreased, as the reason for the larger ships (which has been made possible by consortia) has been economy of scale, which saves costs. Whilst the largest ships are used on the Europe to Asia trades, this has a knock on effect on other trades as the ships are cascaded across trades.

As to choice of services and quality of services, this will depend on the trades.

21. a) Are you aware of types of cooperation between carriers that are not covered by the Consortia BER?
- ☒ Yes
- ☐ No

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

There are some bilateral agreements between some lines for equipment interchange, but multilateral equipment interchange would reduce the number of empty boxes needing to be repositioned and should be encouraged.

22. a) Do carriers cooperate in joint purchasing (e.g. port services, inland transport, feeder transport)?
- ☒ Yes
- ☐ No

b) If yes, is such cooperation prevalent? Please explain  
*1000 character(s) maximum*

Some lines to cooperate in joint purchase of feeders and port services.

Our impression of inland transport is that these cooperations are limited; this is in part due to the negative position taken by shippers forums in the past. We would have thought that more joint procurement especially by smaller lines with respect to say rail services (which tend to have high market shares and are often regulated) would be a good idea.

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

a) Effects on your organisation

More work for lawyers and economists, and less short-term cooperations.

Click or tap here to enter text.

b) Global or industry effects

*1000 character(s) maximum*

Services follow demand which can change quickly, there are all sorts of cooperations which start and then develop or stop. These will reduce due to the uncertainty that no block exemption will create. Currently many lines know the CBER well and if their market share is under 30% we would not expect any external legal cost to be involved.

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

b) Please explain.

*1000 character(s) maximum*

By definition, the participants in consortia must involve other jurisdictions, i.e. must be international.

This sector is the subject of international conventions and is important to national security and the ability to trade. It is for this reason that the US and China have dedicated regulators – the Federal Maritime Commission (FMC) and Ministry of Transport (MOT).

The rest of the world are following either the block exemption route (such as Israel, Singapore, Hong Kong and Malaysia), or the US approach of requiring filings and monitoring. The latter requires more resources than to extend the block exemption.

## 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

b) Please explain.

If you mean is the block exemption logical and consistent with the other instruments mentioned above, on the whole they are, but they are not exactly the same.

As mentioned above, the horizontal guidelines at introduction paragraph 18 state that they do not apply to the extent that there are sector specific exemptions. So, for example, as mentioned above the way to calculate market share in the CBER is narrower than in other exemptions, initial/lock in periods are clearly set out and the joint activities allowed are more generous. This does not make the CBER inconsistent with EU competition policy. If the block exemption is removed, it will create uncertainty, which is likely to result in the industry wanting informal meeting with DGComp to recreate what the block exemption currently provides. This will be more resource intensive for DGComp and less transparent.

## 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

b) Please explain.

*1000 character(s) maximum*

The specific block exemption adds clarity to how liner shipping can cooperate and is more generous with regard to the operation or use of stevedores and ports. This is appropriate as the lines must agree on the ports of call and cannot have discharge at different terminals in the same port region.

## Final comments and document upload

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27. If there anything else you would like to say which may be relevant for the evaluation of the Consortia BER, feel free to do so.

*1000 character(s) maximum*

Click or tap here to enter text.

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

For ease of reference we attach the following:

(1) Communication by the Commission: Report on the possibility of a group exemption for consortia agreements in liner shipping – COM 90 (260) final, 18 June 1990;

(2) Working Paper of DGIV: Report on Commission Regulation No 870/95, Liner Shipping Consortia (28 January 1999);

(3) Technical Paper on the revision of Commission Regulation 823/2000 dated October 2008).

(4) Article: "The Grand Alliance", from Competition Policy Newsletter – 2000 – Number 2 – June, commenting on the non-opposition procedure exemption for GA in 2000.

(5) Letter from EU Commission re. How to calculate market share for the purpose of the consortia block exemption.