

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.
- ☒ **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

1. You are replying:

- ☐ As an individual in your personal capacity
- ☒ 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

EUROPEAN SHIPPERS' COUNCIL

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

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?

- ☒ 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

ESC represents the logistics interests of manufacturers, retailers, wholesalers and cargo owners collectively referred to as shippers. Lobbying and advocacy on the interest of the shippers' are the main areas where activity is developed

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

10. b) Please explain.

1000 character(s) maximum

Since self assessments are not public, they do not provide certainty on how the market is going to evolve as for customers' reference. Items observed in the recent past, like the Bunker Adjustment surcharge and the Sulfur surcharge, are possibly a breach of the price-fixing criteria in the BER, but that is very difficult to prove. Having the consortia fall under the 101(1) would reverse the burden of proof and would allow the consortia's customers to better defend themselves against potential price-fixing

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

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

1000 character(s) maximum

As a customer of a consortium it is very difficult to have visibility and to detect whether a consortium is in breach of the provisions of the BER and therefore from that perspective the legal certainty that the BER offers to the shippers. This is the reason of the low rating on most of the topics described.

12. a) Based on your experience, to what extent does self-assessment of a consortium's compliance with EU competition law rely on instruments other than Consortia BER that provide guidance on the interpretation of Article 101 TFEU (for example: the Horizontal Guidelines, Article 101(3) Guidelines, the Specialisation BER and EC decisional practice)?

	Very high	High	Intermediate	Low	Very low	I don't know
Horizontal Guidelines	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Article 101 (3) TFEU Guidelines	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Specialisation BER	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
EC decisional practice	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

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

1000 character(s) maximum

We, as shippers' representatives, have no (neither shippers) insight on how the carriers perform their self-assessment, therefore we cannot judge which instruments they use. We rated "I don't know" since we have no guidance or visibility on how the carriers perform their self-assessment, and according to this, cannot judge which instruments they use.

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

Some signs are perceived as price-fixing and price-signaling, although there is no evidence that this is linked to the BER because when a surcharge gets announced, it starts with one carrier and is followed by multiple carriers of multiple consortia. The BER has not resulted in a significant sharing of the benefits with the customers: the amount of direct port-calls has decreased; port congestions due to the mega-vessel and the extended call time extension at ports have increased; the risk for port stop & leave have increased; blank sailings have not decreased, "booking crunch" collapse has is also a new item that affects current capacity and has appeared into the market during this recent period. All this cannot be linked directly to the consortia, but there is a coincidence in time and performance of consortia execution.

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

- ☒ Yes
☐ No

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

1000 character(s) maximum

Consortia have decreased the number of direct port-port connections and therefore increased transit-times for destinations that are not served by the main hub-ports. Also the number of services per week has decreased even though capacity offered has even increased, due to the fact that the vessels used are larger. Also carriers in the same consortium that used to offer separate services now have combined many of the services, also leading to a decrease in the number of sailings offered per week. There is higher concentration of services and less "Voice of the Customer" service orientation, therefore less service variety. It is difficult to assign these effects only to the existence of consortia, however there currently are less carriers' dedicated customer service departments to provide tailored service to cargo owners.

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

Although forms of price signaling may still exist in the scope of surcharges, we have no evidence that the base fares offered by individual carriers are affected by the fact they are part of a consortium. There is no evidence the prices in general have increased as a result of the consortia, since the general price level may still remain at a competitive range. Rates may be still competitive under a general perspective, but a closer look reveals that current rate fragmentation scenario concludes into higher final costs born by final users and cargo owners.

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

It is difficult for shippers to assess if compliance with the BER has generated additional costs for the carriers. The fact that they do engage in consortia seems to point to the opposite or at least to the fact that any extra cost is offset by the benefits the carriers reap, but there is no significative evidence, although as for the conditions mentioned before, there are now higher stock levels at manufacturer's sites driven by port congestions, service concentration and increase of volume carried at a time. The fact of not providing tailored service to customers forces cargo owners to adapt to a range of available services which are not created according to the customers' requests and needs but only under carrier productivity perspective.

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

It is difficult to assess as a shippers' representative what costs for the carriers are associated with assuring compliance to general competition law when they do engage in a consortium, it seems logical that the stricter rules under general competition law and the fact that the burden of proof in case of litigation shifts back to the carrier will result in higher costs to ensure compliance. An estimate of the increase in costs cannot be provided by the shippers. The stricter rules are the higher costs would be.

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

Increase in vessel size: decrease in the number of sailings per week; decrease in the number of port-to-port pairs serviced, leading to more frequent need for longer average transit-times. Ports which accept the bigger vessels become more congested because a single port-stay port-stay increases so, longer peak-times which results in higher demurrage and detention costs; no decrease in blank sailings; "booking crunch" situation.

The emergence of major consortia has resulted in: less sailings per week; less choice for the shippers to select the vessel-operator to sail with. Carriers do not guarantee they carriage of cargo by themselves since it may be transferred to other consortia members, shippers can no longer choose freely for the better service; the average service level shifts down to the lowest performing carrier in the consortium.

Decrease of service and carrier differentiation – all carriers offer the same (low) service resulting in a commoditization of their product.

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

	Significant increase	Moderate Increase	Stable	Moderate decrease	Significant decrease	Don't know
Number of consortia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Number of carriers operating outside consortia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Number of members in individual consortium	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Capacity deployed by individual consortia	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Number of ports served by consortia	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

19. b) Please explain.

1000 character(s) maximum

All input is based on data that are publicly known and sourced from external and public consultancy

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="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Choice of services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

20. b) Please explain.

1000 character(s) maximum

We believe the wording in question 20.a refers to questions 18 & 19 and not to 3.1 and 3.2 as stated. Prices have been very volatile, driven by the supply-demand more than by the existence of consortia. This volatility is a sign of the fundamental instability of the shipping industry as a whole. The choice of service may have increased because many of the direct port-port connections have been replaced by a hub-and-spoke model with transshipment and the frequency of sailings for any given port-pair has gone down as well. The ability to intervene when things do not go according plan, has decreased significantly with the cost-pressure which resulted in a significant decrease of customer service staff. No "Voice of Customer" oriented available services. A new carrier-customer relationship has been developed that offers no dialogue, which drives to no transparency, therefore no trust is built.

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

☐ Yes

☒ No

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

☒ Yes

☐ No

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

1000 character(s) maximum

We answered yes in 22a in order to be able to advise herewith that we would have preferred to reply "don't know" in 22a since we do not have data

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

As a representative of shippers, the views expressed hereafter represent the feedback we received from our members, not the impact on our own organization. It is difficult to assess what effect the disbandment of the BER would bring. There are other similar examples in the past, like within other industries who were able to adjust to the full competition law without breaking the scheme. However, when other industries had specific regulation, there were more reasons for specific rules than existing now in the liner industry. In the optimistic scenario, stopping the BER could be phased out and would not result in an immediate dissolving of the consortia and the effect on shippers would be minimal at short and positive in the longer term as service levels would hopefully again become part of the manner in which the carriers would compete with one another and offer services according to what is demanded.

23. b) Global or industry effects

1000 character(s) maximum

The global effects would be the same as the effects for the shippers put down in 23.a

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

Our aim is to revoke and replace the current BER as it is mentioned in the final comment of this questionnaire.

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

It frames the market within specific conditions that are not always favorable to customers.

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

Following the general rules of Article 101 TFEU, consortia can still be formed and the consortia that exist today could in all likelihood continue to operate in one form or another. It would however allow a much better instrument for shippers to react if apparent breaches of competition law are noticed. It would also open up the channels of communication between the shippers and the liners and as such could lead to a win-win in which differentiated services and differentiated pricing could again be part of the negotiation and tendering process and allow a more differentiated choice for shippers to choose for a premium service at a higher rate if they wish to do so. This differentiated offer and the mentality switch needed to create it, is not present today and may not arise if the protection of the BER remains in place.

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 European Shippers' Council recommends to revoke and replace the BER as it exists today. The new BER shall apply under a lower than 30% market share and to consortia which do not exceed a certain size. For the others self-assessment of the benefits of the collaboration for the stakeholders shall include criteria formulated in a SMART-way. Finally the replacing BER shall provide for review by EC of the consequences on the market of M&A between 2 members of different very large consortia. Also, to reach a well-functioning market despite its high level of concentration, other (legal) instruments shall be considered as part of a

paradigm-shift, such as offering to smaller shippers some kind of protection against the conditions applied to them by the market. If all these conditions are not met ESC prefers the BER to be discontinued completely.

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

COMP-CONSORTIA-EVALUATION-2018@ec.europa.eu
