

EUROPEAN SHIPPERS COUNCIL/GLOBAL SHIPPERS FORUM

European Commission Review of the EU Consortia Block Exemption Regulation (BER) 96/2009 - Background Briefing & Guidelines to Completion of Shippers Targeted Questionnaire -

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INTRODUCTION

ABSTRACT

This report refers to the current review process of the EU Consortia Block Exemption Regulation (the BER) by the European Commission and its tailored approach for stakeholders involved this particular one for shippers and freight forwarders. This document is presented in two parts;

- Part A: state of art of BER and its current effects into maritime logistics operations as for shippers' concerns
- Part B: explanation guideline related to the targeted questionnaire for shippers

A copy of the European Commission's on-line blank targeted questionnaire for shippers & freight forwarders is attached to this document in paper format for perusal.

CALENDAR OF EVENTS

Due date for questionnaire submission: latest by December 20th 2018

ACCESSING THE QUESTIONNAIRE

This is an online e-questionnaire with personal and non transferable profiles, specifically targeted at shippers and freight forwarders. Access user & keys are provided by European Commission Directorate General for Competition (DG Comp). To receive the invitation message to respond with the exclusive access keys, a request email should be sent to the following address COMP-CONSORTIA-EVALUATION-2018@ec.europa.eu

ADDITIONAL INFORMATION

- European Commission Public Consultations
http://ec.europa.eu/competition/consultations/2018_consortia/index_en.html
- European Commission Evaluation Roadmap
http://ec.europa.eu/competition/consultations/2018_consortia/roadmap_en.pdf

For any further needed information please refer to info@europeanshippers.eu

A - BLOCK EXEMPTION REGULATION (BER) STATE OF ART - FAQ

What are consortia?

Legally, shipping consortia are defined as follows:

‘consortium’ means an agreement or a set of interrelated agreements between two or more vessel-operating carriers, which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to combine their operations by means of technical, operational and/or commercial arrangements;

In practice this would have to be shifted into an operational impact of better & diverse service resulting from the cooperation between vessel-operating carriers. The European Commission DG Competition uses the following definition:

Liner shipping services consist of the provision of regular, scheduled maritime cargo transport on a specific route. They require significant levels of investment and therefore are regularly provided by several shipping companies cooperating in "consortia" agreements. Consortia can lead to economies of scale and better utilisation of the space of the vessels. A fair share of the benefits resulting from these efficiencies can be passed on to users of the shipping services in terms of better coverage of ports (improvement in the frequency of sailings and port calls) and better services (an improvement in scheduling, better or personalised services through the use of more modern vessels, equipment and port facilities)¹

Any such cooperation may not dominate more than 30% of the relevant market. The relevant market is calculated per route and per product market. ‘Consortia’ can refer to Alliances, Slot Charter Agreements (SCA)² or Vessel Sharing Agreements (VSA)³.

It may very well be that shippers are not always aware that they deal with a consortium, as only one of the vessel-operating carriers will usually conduct all communications and provide documentation for the transportation as required.

N.B. In filling out this questionnaire, please indicate if you are unsure whether or not you are dealing with ‘consortia’, as this may not always be clear in practice!

Why this questionnaire?

The EU Block Exemption Regulation exempts shipping lines that co-operate in Consortia and providing services to and from EU ports, from certain aspects of regular EU competition law (contained in Article 101 of the Treaty for the Functioning of the EU Market (Art 101 TFEU)). This current regulation was first made

¹ European Commission, Competition, Public Consultations

http://ec.europa.eu/competition/consultations/2018_consortia/index_en.html [Nov 14th 2018]

² Slot charter agreements (SCA) require a fixed percentage of vessel capacity to be exchanged between carriers over a given time period. There is one carrier that operates the vessel, but other carriers use a share of the vessel capacity, so that they can widen their coverage. (ITF report 2018 p. 10)

³ Vessel sharing agreements (VSA) are more cooperative and entail cooperation between companies to fulfil demand on particular trade routes through sharing of vessels owned and/or operated by different carriers, and joint optimisation of ship scheduling and assignment of ships to routes (Panayides and Wiedmer, 2011). Global alliances could be considered a bundle of vessel sharing agreements between the same carriers on a global scale. Whereas slot charter agreements are basically contractual agreements, strategic alliances are mainly operational agreements (Ryoo and Thanopoulou, 1999). (ITF report 2018 p. 10)

in 2009 and was valid for five years. It was renewed in 2015, and will expire on 25 April 2020 unless a further renewal decision is taken by DG Competition.

The European Commission is therefore undertaking a consultation process by evaluating this regulation. For that purpose, DG Competition has issued two online questionnaires, one for completion by the public and general business and separate, questionnaires for different parties in the maritime supply chain, including one for shippers and forwarders. These questionnaires are part of the evaluation process as the BER regulation states that the burden of proof for renewal lies on the end users to demonstrate if current practice is compliant with competition law and if the expected benefits have been brought into the market.

This point is of utmost importance since it is relevant to demonstrate, through the replies provided in this targeted questionnaire for shippers, if these benefits are really perceived into the maritime logistics operations as a result of the current BER regulation. All related stakeholders, and specifically shippers and freight forwarders in this targeted questionnaire, are asked to comment particularly on the effectiveness, efficiency and relevance⁴ of the BER regulation, considering evolutions in liner shipping practices and current scenario of the maritime supply chain.

If, after careful consideration of all involved stakeholders' arguments by the DG Competition, the evaluation of the BER leads to the conclusion that the BER is not renewed, the BER will automatically expire on 25/4/2020. If that happens, all ocean-carriers will have to be compliant with general competition law as laid down in Art. 101 TFEU (and further). To achieve a decision not to renew the BER, shippers and other parties involved in maritime transport should make clear that the BER has not met the positive outcomes for shippers that the regulation was aiming for, and that in practice it has lost either its effectiveness, efficiency and relevance and that it is currently only serving the interests of maritime carriers. Only if the EU identifies and accepts these arguments will the BER expire and regular competition law would become applicable to maritime carriers.

What happens if the BER expires?

If the BER is allowed to expire, shipping line consortia would still be allowed to operate but would become subject to the requirements for regular EU competition law. This would mean that initiation of any action to enforce fair competition would lie with DG Competition. Under the BER it is the responsibility of shippers and forwarders to initiate a 'complaint' to the DG Competition if they believe unfair or illegal co-operation is taking place. Experience in other economic sectors suggests that initiating action is more likely when the share of market exceeds about 20 per cent. Under the BER consortia are allowed to control up to 30 percent of the market in individual trades.

There is no scale research of the potential market consequences to fully answer this question, and there is a risk of rapid and large-scale restructuring of the liner shipping market through merger and acquisition. This may restrict shippers choice and quality of service still further.

However, the following items are eligible as to consider and foresee how a maritime world without BER would behave and react:

- 1) **Similar situations comparable to other markets.** The removal of Block Exemptions from other market sectors (e.g. the automotive industry) did not lead to a market collapse or a worsening of conditions for customers (quite the opposite for European car buyers, in fact)

⁴ **(a) Effectiveness:** Considering the major developments in the industry, does the BER still facilitate economically efficient cooperation that also benefits consumers? **(b) Efficiency:** What is the effect of the BER on costs? Does it help undertakings to cut costs or conversely does it increase compliance costs? Which policy option would cause less burden or complexity? **(c) Relevance:** Is the BER still relevant considering the major developments in the industry and the modes of cooperation between maritime carriers

- 2) **Adaptation to normal market conditions without a cliff edge effect.** The maritime shipping market is believed to be vulnerable to the shock of ending the BER. If this is the case, the return to normal conditions could be phased in over a period of time. For example, the ending of the Shipping Conferences BER in 2006 was implemented with two years transition, and the market was able to adapt. A similar approach could be taken to the ending of the Consortia BER, with a decision to end taken in 2019, effective in 2020 but with some time (e.g. two years) for shipping lines to comply with the new arrangements.
- 3) **Future market to include all players.** Maybe the future of container shipping may not lay with the current players, and it is key that its evolution is conducted by welcoming new participants with different business models and more efficient cost structures. Part of shippers' frustrations with the conference and Alliance system is it seems to deny new entrants the opportunity to compete on equal terms.

What happens if the BER is renewed?

In that case the rules would stay the same and nothing would change. However, it is likely the Regulation would be renewed only for another five years, with a further review due in 2025-25

B - TARGETED QUESTIONNAIRE - Guidance on completion of the targeted questionnaire for shippers

A. Respondent's profile

Here the company and person should be identified as clearly as possible, including the full name and type of business structure such as LLP.

As you will notice, after every question the additional question is posed with regard to the confidential nature of the response. This is due to a recent EU guideline concerning the protection of trade secrets. If you feel your answer in any way is part of your company's trade secret(s), please indicate this by checking the 'Yes' box.

In addition we would advise that you display the information you need protected as follows: **CONFIDENTIAL [.....] CONFIDENTIAL**. The confidential information is then demarcated as between the words 'confidential' in bold, to make extra clear that is the information that should not be divulged.

B. Questions on your company's cooperation with consortia

Clarification of "consortium concept" as defined in the Article 2(1) of Regulation 906/2009. No reply needed to this point.

I. General

Question 3 asks for an estimation of the total TEU that your company ships to/from EU ports per year.

Question 4 asks for a specification of which carriers have been used for each route. This is because each consortium can only have a market share of up to 30% of a certain product group on a certain route. It does not matter whether or not you are aware of carriers cooperating on your route with your product group. Please just indicate the carriers used by you, and of course if you are aware of a cooperation between ocean carriers on your route, please let your answer reflect this.

You might have for instance noticed on the Bill of lading that it is issued by one carrier, but the named vessel of another carrier. It might also be that you have heard afterwards from your carrier that your container was put on the vessel of another carrier. It might also be that in communicating with your maritime carrier you have been directed to another carrier. A last option is that your carrier in 'customer advisory' letters, informed you of the place of discharge of your cargo. Usually, the vessel name is included in such messages. Again, you could check if the vessel is owned by the maritime carrier you contracted with or not.

In Question 5 a specific question is asked whether your contract for maritime carriage is with a single carrier, or with a consortium (cooperation) of carriers. Please check your contract to see, if one or several parties are listed as contractual parties and indicate this in your explanation under 5.1. In standard contracts the contractual parties are defined on page 1 of the contract. Be as precise as possible, as for instance some carriers have multiple LLP's under which they can do business. Another possibility is that you only have a Bill of Lading. In that case, please check if you can find the name of the vessel on the B/L (this is not always included). It might be that the B/L was issued by one carrier, but the name of the vessel indicates that another carrier was involved in carrying out your transport. This can also be found in 'customer advisory' letters.

Please also indicate if you are unsure whether or not you are in fact dealing with consortia. It might well be that on your contract or B/L only one party is listed, even though the transport contracted for is carried out by means of a consortium.

II Benefits of consortia

Question 6

If in handling your cargo it was clear that your carrier was not acting alone, did you experience any increase in efficiency in handling your cargo?

In other words when multiple carriers handled your cargo, was there a positive difference in any of the following factors as opposed to when your cargo was handled by a single carrier?

For instance, was there a positive effect noticeable on:

- prices?
- Frequencies?
- number of direct ports of call?
- availability of capacity?
- Reliability?
- Transparency?
- customer service?
- integrated logistical solutions?
- Other, namely....

If you have answered yes on any of the above, please indicate if you have any evidence to support that. For evidence you could think of documents relating to comparable transports and one was carried out by a consortium, and the other was not.

If you have had only negative experience, please save that answer for question 7.

If you are unsure if you have dealt with consortia, please state:

'I cannot answer this question, because I do not know if my cargo was transported with the help of consortia, or by single maritime carriers'.

Question 7

Any negative effect that you experienced from consortia, please state them as fully as possible, with as much evidence as possible. In other words have you ever been in an actual situation in calls for bids, negotiations with consortia or other communications from consortia where you were worse off dealing with consortia?

If you prefer to deal with single carriers instead of consortia is that because of a negative experience? Than please indicate here what that negative experience was.

7.2 is meant to be able to analyse whether a possible positive answer under 6 should be trumped by the answer under 7 or vice versa.

III Competition between consortia

N.B. Please note that these questions regard possible competition between consortia as groups. In other words whether the 'groups of carriers working together' are competing with other 'groups of carriers working together'.

Question 8

Because consortia should not monopolise the market, this question seeks to find out whether or not (to your knowledge) there is still competition *on pricing* between consortia. So, basically this question asks whether or not you have ever experienced if one consortium was competing on price with another consortium. If you have only experienced competition between consortia on quality of services, please reserve your answer for question 9.

If the answer is yes, this should be indicated on a scale from 0 to 5 , where 0 means 'no price competition' and 5 means 'full price competition'. If it is your daily experience that different groups of carriers working together are in competition with other groups of carriers working together on price, then please indicate this by marking '5'. If you have never witnessed this, please indicate this by marking '0'.

Question 9

This question is basically the same as question 8. Only in this question , instead of competition on price, this question asks whether you have ever noticed competition of quality of services. It might be that even though prices are the same whether you book your transport with one consortium or the other, but there is a clear difference in the level of service/quality that is offered.

If you see this kind of competition on a daily basis, please indicate this by marking '5'. If you have never witnessed this, please indicate this by marking '0'.

Question 10

If there is any aspect or element of consortia that you find distinguishing or different from other consortia, please indicate. Probably, this question is asked to see if cooperation between maritime carriers leads to further progress in maritime transport such as bigger vessels or other innovations, that would not be possible without cooperation between carriers. Such distinguishing features should be indicated here.

IV Competition between members of the same consortium

N.B. Please note that these questions are very different from the questions before. Where the previous questions regarded competition between consortia, these questions focus on competition between carriers who are involved in one consortium.

Question 11

If you know of carriers that cooperate in any way, do they (in your experience) still compete with each other in terms of pricing? This question is asked because price fixing is prohibited under the BER. Under the old 'liner conferences' this was permitted, perhaps that is why many people still believe this is allowed, however it is not. This question seeks to find out if members of consortia abide by this rule.

Question 12

If you know of carriers that cooperate in any way, do they (in your experience) still compete with each other in terms of quality of service? This question is asked because members of a consortium should still compete with each other, also on quality of service. In other words, do you still see a difference in quality of service between members of the same consortium?

Question 13

This question asks if you noticed if members of a consortium cooperate in adjusting capacity during peak and off-peak seasons. This question is posed because regulating capacity is not permitted under the BER. If you have evidence of members of a consortium regulating capacity in practice, please indicate this here.

V other issues

Question 14

Just in case there is any evidence you might have of consortia not following the rules of the BER this question is asked to make sure shippers have room to indicate if there is any other evidence you have of foul-play. In other words, if you have experienced any negative consequences of consortia in any way that was not addressed by the previous questions, please indicate here what your experience was and how it had a negative impact on you/your transport.

Perhaps this is becoming repetitive, but if you are unaware if your cargo is transported by a consortium or a single carrier, please indicate this here again. It might well be that you are unsure, as carriers do not often make it explicit that your transport is in fact handled by cooperating with other carriers.

COMP/HT.5252 - Review of the Consortia Block Exemption Regulation 2020 - Targeted Questionnaire for Shippers and Freight-forwarders

Deadline: 20/12/2018

A. Respondent's profile

By submitting this questionnaire to the European Commission you personally confirm that you are the legal representative of the organisation/company listed in this section or that you have been authorized to respond to this questionnaire by its representatives and on their behalf.

- Please provide the full name and address of your company or organization together with a short description, indicating the most important activities of your business and the countries in which you are active.**
- (1) **Indicate whether your company belongs to a group of undertakings. Please specify that group.**

Does your reply contain business secrets ? Yes () No ()

- (2) **In order to facilitate possible further enquiries, please indicate the name, position, telephone number and the e-mail address of the person responsible for the replies to this questionnaire.**

Does your reply contain business secrets ? Yes () No ()

B. Questions on your company's cooperation with consortia

The concept of a "consortium" used in this questionnaire is defined in the Article 2(1) of Regulation 906/2009:

"'consortium' means an agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements"

I. General

- (3) **Give an estimate of the annual TEU volume that your company ships using maritime transport services (to and from EU).**

Does your reply contain business secrets ? Yes () No ()

- (4) **List all liner maritime container shipping companies (carriers) or consortia to and from EU whose services your company used from 2015 until now. Please also specify on which routes (trades) you have used the services of each of the carriers or consortia.**

Does your reply contain business secrets ? Yes () No ()

- (5) **On routes covered by a consortium, do you have individual contracts with the carriers or a contract with the consortium?**

- () Individual contracts
() Contract with consortium
() Both
() Other (please specify)

Does your reply contain business secrets ? Yes () No ()

(5.1) Please explain your answer.

Does your reply contain business secrets ? Yes () No ()

II. Benefits of consortia ("efficiencies")

**On the basis of your experience, do consortia generate efficiencies that are passed-on to their customers?
Namely, how are the services offered by a consortium compared with those offered by an individual carrier?**

- (6) **To the extent possible please refer in your response to the following elements, as relevant: prices, frequencies, number of direct ports of call, availability of capacity, reliability, transparency, customer service, integrated logistical solutions, other (please specify).**

Does your reply contain business secrets ? Yes () No ()

- (7) **Do you consider that consortia generate externalities that adversely affect your company?**

() Yes

() No

() I don't know

Does your reply contain business secrets ? Yes () No ()

(7.1) Please explain your answer and provide relevant examples.

Does your reply contain business secrets ? Yes () No ()

(7.2) If you replied "yes" to question 7, to what extent would these externalities off-set the benefits you gain from working with consortia?

Does your reply contain business secrets ? Yes () No ()

III. Competition between consortia

On the basis of your experience, to what extent (on a scale from 1 to 5), is there price competition between the different consortia (1: no price competition, 5: full price competition)?

No price competition	⊙	⊙	⊙	⊙	⊙	Full price competition
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Does your reply contain business secrets ? Yes () No ()

(8.1) Please explain your answer and provide relevant examples.

Does your reply contain business secrets ? Yes () No ()

On the basis of your experience, to what extent (on a scale from 1 to 5) is there competition on the quality of services provided between consortia (1: no competition on quality, 5: full competition on quality)?

No competition on quality	⊙	⊙	⊙	⊙	⊙	Full competition on quality
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Does your reply contain business secrets ? Yes () No ()

(9.1) Please explain your answer and provide relevant examples.

Does your reply contain business secrets ? Yes () No ()

- (10) **Please explain on which elements of service consortia differentiate themselves from other consortia and provide relevant examples.
Where relevant, distinguish among different consortia in your reply.**

Does your reply contain business secrets ? Yes () No ()

- IV. Competition between members of the same consortium**
On the basis of your experience, to what extent (on a scale from 1 to 5), is
(11) there price competition between the different members of a consortium
(1: no price competition, 5: full price competition)?

No price competition	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	Full price competition
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Does your reply contain business secrets ? Yes () No ()

- (11.1) **Please explain your answer and provide relevant examples.
Where relevant, distinguish among different consortia in your reply.**

Does your reply contain business secrets ? Yes () No ()

- On the basis of your experience, to what extent (on a scale from 1 to 5) is**
(12) there competition on the quality of services between the different
members of a consortium (1: no competition on quality, 5: full
competition on quality)?

No competition on quality	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	Full competition on quality
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Does your reply contain business secrets ? Yes () No ()

- (12.1) **Please explain on which elements of service carriers differentiate themselves from other members of the same consortium and provide relevant examples.
Where relevant, distinguish among different consortia in your reply.**

Does your reply contain business secrets ? Yes () No ()

(13) To your knowledge, do members of consortia jointly adjust capacity, e.g. adding capacity during peak time seasons or reducing during off-peak times?

☐ Yes

☐ No

☐ I don't know

Does your reply contain business secrets ? Yes ☐ No ☐

(13.1) Please explain your answer and provide relevant examples and where relevant distinguish among different consortia in your reply.

Does your reply contain business secrets ? Yes ☐ No ☐

(13.2) If you replied "yes" to question 13, clarify to what extent such adjustments would be made.

Does your reply contain business secrets ? Yes ☐ No ☐

V. Other issues

(14) Do you have any other competition observations in relation to consortia not covered by your answers to the questions above?

Does your reply contain business secrets ? Yes ☐ No ☐

(14.1) Please explain your answer.

Does your reply contain business secrets ? Yes ☐ No ☐

Thank you for your cooperation.

Attachment

Does your reply contain business secrets ? Yes (☐) No (☐)