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EVALUATION
of the

Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

{SWD(2019) 412 final}

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Glossary

Term or acronym	*Meaning or definition*
BER(s)	Block Exemption Regulation(s).
CLECAT	European Association for Forwarding, Transport, Logistics and Customs Services.
Commission	European Commission.
Council	European Council.
ECSA	European Community Shipowners' Associations.
ESC	European Shippers’ Council.
ETA	European Tugowners’ Association.
Evaluation	2018-2019 Evaluation of Consortia BER.
FEPORT	The Federation of European Private Port Companies and Terminals.
FTA	Freight Transport Association.
ICS	International Chamber of Shipping
ITF	International Transport Forum
NCA	National Competition Authority, i.e. competition authority of an EU Member State.
SCA	Slot charter agreement
SWD	Staff Working Document (present document).
TEU	Twenty-foot equivalent units.
TFEU	Treaty on the functioning of the European Union.
VSA	Vessel sharing agreements
WSC	World Shipping Council.

1. INTRODUCTION

Liner shipping services consist of the provision of regular, scheduled maritime cargo transport on a specific route. They require significant levels of investment[1] and therefore are regularly provided by several shipping companies ("carriers") cooperating in consortia agreements.[2]

On 28 September 2009 the Commission adopted the Commission Regulation (EC) No 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) ("Consortia BER").[3] While it was initially due to expire on 25 April 2015, with the Commission Regulation (EU) No 697/2014 ("Prolonging Regulation") the Consortia BER was prolongued for an additional 5 years and will expire on 25 April 2020.[4]

The current evaluation of the Consortia BER is prompted by the approaching expiry date. The purpose of the evaluation is to assess whether the Consortia BER is still relevant and delivering on its objectives. The criteria applied in the evaluation are Effectiveness, Efficiency, Relevance, Coherence, and EU added value.[5] The evaluation will inform the decision of whether to let the Consortia BER expire or prolong it and, if so, under which conditions, if any.[6]

The temporal scope of the evaluation is the period since the last prolongation of the Consortia BER in 2014 to this day.[7]

This Staff Working Document ("SWD") reflects the findings and views of the Commission's staff and does not reproduce the formal position of the Commission itself.

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[1] See e.g. Council Regulation (EC) No 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 79, 25.3.2009, p. 1–4, recital 4: "*Liner shipping is a capital intensive industry.*"

[2] A consortium agreement consists of one or a set of separate but interrelated agreements between carriers which provide international liner shipping services, the object of which is to bring about cooperation in the joint operation of service.

[3] Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 256, 29.9.2009, p. 31–34.

[4] Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application, OJ L 184, 25.6.2014, p. 3. The only purpose of this Regulation is to amend one provision in Consortia BER and extend its validity until 25 April 2020.

[5] The assessment criteria are further elaborated in Section 5.

[6] Allowing the Consortia BER to expire would mean that consortia agreements would be examined on a case-by-case basis under the general rules on competition just like cooperation agreements in other sectors.

[7] The last prolongation in 2014 also marks the conclusion of the most recent assessment of the Consortia BER – this is an additional reason why the temporal scope of the current evaluation starts at that point.

It does not prejudge the final nature of any act or the content of any delegated or implementing acts that may be prepared by the Commission.

2. BACKGROUND TO THE INTERVENTION

2.1. Legal and policy framework

Article 101(1) TFEU[8] prohibits agreements between undertakings that restrict competition. However, Article 101(3) TFEU[9] allows declaring such agreements compatible with the internal market provided they contribute to improving the production or distribution of goods or to promoting technical or economic progress ("Efficiency Gains"), while allowing consumers a fair share of the resulting benefits.[10]

In an historical perspective, under Regulation 17 of 1962[11], the Commission had sole power (subject to review by the Union Courts) to grant individual exemptions to agreements on the basis of criteria nowadays set out in Article 101(3) TFEU.[12] As a rule, agreements, decisions and concerted practices falling under what is today Article 101(1) TFEU and in respect of which the parties sought application of Article 101(3) TFEU had to be notified to the Commission.[13]

In these circumstances, block exemptions were introduced into EU competition law to exempt whole categories of agreements, decisions and concerted practices that were considered unproblematic from that notification obligation. The Commission has been granted by Enabling Regulations of the Council the power to declare that certain types of agreements, decisions and concerted practices are compatible with the internal market under Article 101(3) TFEU. Such declarations are made by the Commission through measures known as BERs.

Since the entry into force of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, ("Regulation 1/2003")[14] on 1 May 2004, agreements, decisions and concerted

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8 Previously Art. 81(1) of the Treaty establishing the European Community ("TEC"). As of 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (OJ C 306, 17.12.2007, p. 1) renumbered the articles of the TEC. Article 81 TEC became Article 101 TFEU and remained, in substance, unchanged. According to Article 5(3) of the Treaty of Lisbon, references to Article 81 TEC in instruments or acts of EU law are to be understood as referring to Article 101 TFEU.

9 Previously Art. 81(3) TEC.

10 On Efficiency Gains, see Section 3.2 of the Guidelines on the application of Article 81(3) [now Article 101(3)] of the Treaty, OJ C 101, 27.4.2004, pp. 97-118, 104, ("Article 101(3) Guidelines").

11 EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, p. 204.

12 Article 9(1) of Regulation No 17.

13 Article 5(1) of Regulation No 17; Article 5(2) stipulated which agreements, decisions and practices are not obliged to, but may be, notified.

14 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

practices caught by Article 101(1) TFEU do not have to be notified to the Commission anymore. In addition, those agreements, decisions and concerted practices caught by Article 101(1) TFEU which satisfy the conditions of Article 101(3) TFEU are not prohibited, without any prior decision to that effect being required.[15]

A common trait of BERs is that they contribute to the legal clarity and certainty and therefore facilitate self-assessment. The reasons for this are twofold: Firstly, by declaring the specific conditions for exemption from the application of Article 101(1) TFEU, BERs give users reliable "check lists" and indicate which elements are (and conversely which are not) relevant for establishing that an agreement will be exempt. Secondly, in their very essence BERs (in particular sectoral BERs) are more specific and concrete than general competition rules. The Consortia BER for example uses industry-specific terminology and refers to arrangements that are very specific to consortia (that differ significantly to other sectors). By providing more specific and concrete guidance than general instruments of competition law, BERs provide legal clarity as to the way those rules would apply in a specific industry and to specific contracts and leave less space for misinterpretation of the rules. This in turn increases the certainty of a self-assessment for compliance (See also Section 5 for the Consortia BER).

Regarding liner shipping, the current enabling Council Regulation No 246/2009 ("Consortia Enabling Regulation")[16] was adopted in 2009.[17] It provides that in accordance with the provisions of Article 101(3) TFEU, the Commission may by way of regulation, adopt decisions exempting, under specific terms and conditions, agreements and practices that have as an object to promote or establish cooperation in the joint operation of maritime transport services between liner shipping companies, for the purpose of rationalising their operations by means of technical, operational or commercial arrangements (with the exception of price fixing) from the application of Article 101(1) TFEU. According to the Consortia Enabling Regulation such BER for consortia can be adopted for a period of five years with the possibility of prolongation. Furthermore, the BER for consortia may be repealed or amended if factual circumstances underpinning its adoption have changed.[18]

On the basis of the Consortia Enabling Regulation, on 28 September 2009 the Commission adopted the Consortia BER, which sets the specific conditions for the Article 101(3) exemption of consortia agreements. This exemption applies if the combined market share of the parties to a consortium agreement does not exceed 30% on the relevant market affected by the agreement.[19] Namely, it is considered that users can

[15] Art 1(2) of Regulation 1/2003. By contrast, in notification procedures, commercial subjects are obliged to notify their agreements for approval by a competition authority. Until 30 April 2004, such a notification procedure was in place for agreements, decisions and concerted practices satisfying the conditions of Article 81(3) TEC.

[16] Council Regulation (EC) No 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 79, 25.3.2009, pp. 1–4.

[17] BERs for consortia have been in place continuously since 1995.

[18] Consortia Enabling Regulation, Article 2.

[19] Article 5(1) of the Consortia BER.

only benefit effectively from consortia if there is sufficient actual or potential competition in the relevant markets in which the consortia operate. If this market share threshold is exceeded the Consortia BER does not apply, but an individual exemption under Article 101(3) TFEU still may. Finally, in case agreements falling under the Consortia BER would nevertheless have effects incompatible with Article 101(3) TFEU, the Commission may withdraw the benefit of the block exemption.[20]

2.2. The context of the liner shipping industry

Liner shipping is an assets-heavy, capital-intensive industry with high fixed costs (running, maintenance, insurance of vessels, staffing), low variable cost (each additional container transported represents a very low additional cost for the operation of a vessel), and perishable services (unexploited capacity cannot be transferred to and sold in the next voyage). In principle, vessels sail regardless of whether they are empty or full, and capacity that is not used on one voyage cannot be used on another. To offer a liner shipping service on a certain trade route once a week, a minimum number of vessels is required, which is known as a string or loop. For example, on the North Asia to Northern Europe trade, a string consists of between 10 and 12 vessels. Often, a consortium must deploy multiple strings to offer the multi-port services required by many shippers.[21]

Consequently, liner shipping services are regularly provided through cooperation agreements with other shipping companies. Cooperation agreements can consist of slot charter agreements[22], consortia (also called VSAs, or alliances).[23]

For the purposes of the Consortia BER a consortium agreement consists of one or a set of separate but interrelated agreements between liner shipping companies under which the

[20] Consortia BER, Recital 12. In that respect, the negative effects that may derive from the existence of links between the consortium and/or its members and other consortia and/or liner carriers on the same relevant market are of particular importance. Besides, according to Article 29 of Regulation 1/2003, the Commission and the NCAs may withdraw the benefit of a BER, and hence the benefit of the Consortia BER. An NCA may withdraw the benefit of the Consortia BER in the territory of its Member State, or in part thereof.

[21] See submission of WSC, ECSA, ISC and ASA of 20 December 2018, p.3 and 6.

[22] Under a SCA a shipping company ("charterer") "rents" a predetermined number of container slots on a vessel of another shipping company in exchange for cash (normal slot charter) or slots on its own vessels (slot exchange). SCAs do not normally involve joint decision making concerning marketing, ports of call, schedule or the use of the same port terminals (See e.g. COMP/M.8594 COSCO/OOIL paragraph 26). With SCAs carriers only buy or exchange capacity on existing services of other carriers and do not rationalise or improve the service. They therefore are not covered by Article 2(1) of the Consortia BER. A VSA can include several SCAs between the parties to the agreement (Commission services document, Technical paper on the revision of Commission Regulation EC 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), paras. 21 and 40).

[23] Alliances are basically vessel sharing agreements, the main difference as opposed to consortia being that they cover multiple trades rather than one trade, i.e. they are a matrix of vessel sharing agreements operating on the east-west trades (Asia-Europe; trans-Atlantic and trans-pacific) (see e.g. M.7908 - CMA CGM / NOL, Commission decision of 8.7.2016, paragraph 25). Since 2017 there are three alliance that brought together all the major global carriers: 2M (Maersk and MSC), Ocean alliance (CMA CGM, Cosco, Evergreen), THE alliance (Hapag Lloyd, ONE, Yang Ming).

parties operate their joint service.[24] The legal form of the arrangements is less important than the underlying economic reality that the parties provide a joint service.[25] Consortia agreements are typically entered into for renewable periods of 1-2 years.

The main features of a consortium agreement are the sharing of space, the determination of port calls and schedules between the parties.[26] There is however a great variety of different consortia agreements operating in the market, 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 to flexible slot exchange agreements.

Liner shipping companies tend to participate in numerous consortia.[27] However, liner shipping companies will likely have services both within consortia (VSA, SCA) and services run without any partnership. The types of services appear to vary between liner shipping companies, and among trades.

Consortia can lead to economies of scale and better utilisation of the space of the vessels.[28] In principle, 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 (improvement in scheduling, better or personalised services through the use of more modern vessels, equipment and port facilities).[29]

The establishment and consolidation of consortia between shipping lines may have effects on the customers (freight forwarders and direct customers)[30], on the companies

[24] For a full definition refer to Consortia BER, article 2(1).

[25] Consortia BER, recital 3.

[26] Under a consortium, all parties provide one or more vessels and in exchange receive a number of slots across all vessels in the joint service. Each carrier's allocation of slots is determined by the total vessel capacity that they contributed. The costs of each vessel are borne by its respective owner, not the consortium. The parties to the consortium jointly decide the sailing timetable, but there is no price coordination, joint marketing, revenue sharing or, with some limited exceptions, joint purchasing (seee.g. COMP/M.8594 COSCO/OOIL paragraph 28). The Consortia BER exempts both single and multi-trade arrangements.

[27] This has also been confirmed by carriers and their associations (for example in submission of WSC and others of 20 December 2018, Annex 1, pp. 22 ff).

[28] See e.g. Consortia BER, recital 5: "*Consortia generally bring rationalisation and economies of scale which help to improve the productivity and quality of available liner shipping services*", and Consortia Enabling Regulation, Recitals 4 and 5.

[29] See for example Consortia BER, Recital 6 and Consortia Enabling Regulation, Recital 7.

[30] Freight forwarders organise the transportation of goods on behalf of customers according to their needs as intermediaries or freight 'brokers'. In order to provide these services, freight forwarders purchase deep-sea container liner shipping services (usually port-to-port service, including feeder services where applicable), and inland transportation. Direct customers are typically large manufacturers or distributors of products which in whole or in part require overseas transport.

that provide services to the shipping lines in ports (cargo handling, towage, etc.), and possibly on some other stakeholders (e.g. tonnage providers).

2.3. The Consortia BER and its logic

In the Consortia Enabling Regulation, the Council recognized the increasing importance of rationalisation, cooperation and economies of scale in the liner shipping industry and the positive contribution consortia agreements have to them.[31] The Council also identified that legalisation of consortia agreements could make a positive contribution to the competitiveness of shipping in the Union.[32] In adopting the Consortia Enabling Regulation the Council concluded the Commission should be enabled to adopt and declare a BER for certain categories of consortia agreements "*in order to make it easier for undertakings to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy*."[33]

Subsequently, in 2009 the Commission considered that a BER for consortia agreements is justified because "*consortia generally bring rationalisation and economies of scale which help to improve the productivity and quality of available liner shipping services*" and "*promote technical and economic progress",*[34] while "*users of the shipping services […] may benefit from the improvements in productivity which consortia can bring about*."[35]

The adopted Consortia BER declares that in accordance with Article 101(3) TFEU the prohibition in Article 101(1) TFEU does not apply to certain types of consortia agreements in respect to which it can be assumed with sufficient degree of certainty that they constitue an economically efficient cooperation that also benefit consumers[36] and sets the specific conditions under which they are exempt. The Consortia BER declares exempt from Article 101(1) the following activities in a consortium: the joint operation of liner shipping services (e.g. fixing of sailing timetables and ports of call, exchange, sale or cross-chartering of space or slots on vessels, the pooling of vessels, etc.), the joint operation or use of port terminals and related services, capacity adjustments in response to fluctuations in supply and demand and any other ancillary activity in relation to the consortium, which is necessary for its implementation.[37] The exemption does not apply to

[31] See for example Consortia Enabling Regulation, Recital 4: "*Liner shipping is a capital intensive industry. Containerisation has increased pressures for cooperation and rationalisation. The Community shipping industry should attain the necessary economies of scale in order to compete successfully on the world liner shipping market.*"

[32] See, for example, Consortia Enabling Regulation, Recital 6: "*The legalisation of [consortia agreements] is a measure which can make a positive contribution to improving the competitiveness of shipping in the Community*."

[33] Consortia Enabling Regulation, Recital 8.

[34] Consortia BER, Recital 5.

[35] Consortia BER, Recital 6.

[36] The "consumers" for the purpose of Article 101(3) TFEU include not only the final consumer but also the direct customers of the producers concerned (see recital 84 of the Article 101(3) Guidelines).

[37] See Consortia BER, Article 4 (Exempted agreements).

a consortium if its direct or indirect object is the fixing of prices of service to customers, limitation of capacity or sales or the allocation of markets and customers.[38]In addition, the abovementioned exemption only applies if the following conditions are fulfilled:

- First, the consortium meets the market share threshold, meaning that the joint market share of the members of the consortium does not exceed 30% (whereby the individual market share of a consortium member includes all volumes carried by that member in the relevant market, whether within or outside the consortium in question).[39]

- Second, the members of the consortium have a right to withdrawal from the agreement, which can be subject to a maximum period of notice of 6 months (12 months in case of a highly integrated consortium).[40]

By identifying under which conditions consortia agreements were likely to satisfy Article 101(3) TFEU and by exempting them from the application of Article 101(1) TFEU, the Consortia BER provides guidance, clarity and legal certainty with respect to their compatibility with Article 101 TFEU. Liner shipping carriers entering into consortia agreements or already engaged in them can self-assess the compatibility of their agreement with Article 101(1) TFEU and their exemption from it, by assessing if they meet the conditions of the BER. [41]

When the Consortia BER was prolonged in 2014 the Commission explained that "*on the basis of [its] experience in applying the [Consortia BER], it appears that the justifications for a block exemption for consortia are still valid and that the conditions on the basis of which the scope and content of [the Consortia BER] were determined have not substantially changed*".[42]

In this context, the objective of the Consortia BER against which it will be evaluated is to facilitate the creation and operation of consortia. The Consortia BER achieves this objective by providing consortia with clarity and legal certainty with respect to their compliance with EU competition rules.

The intervention logic of Consortia BER is presented below.

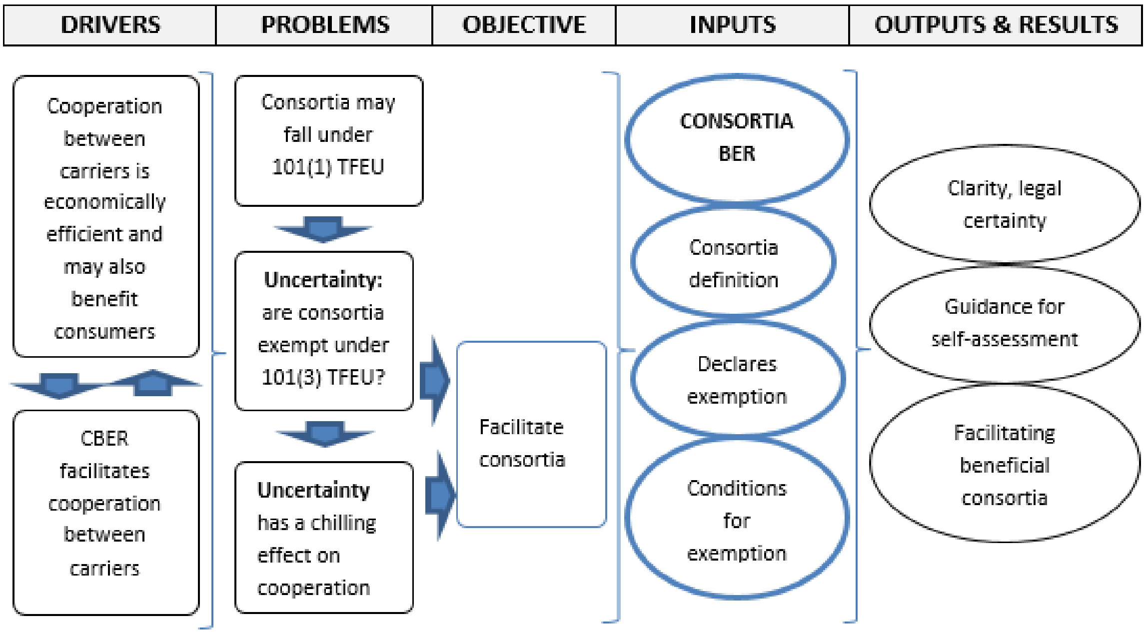
[38] See Consortia BER, Article 4 (Hardcore restrictions).

[39] See Consortia BER, Article 5 (Conditions relating to market share).

[40] See Consortia BER, Article 6 (Other conditions).

[41] The Consortia BER does not have the effect of legalising all consortia agreements and activities. Nor would the repeal of the Consortia BER render consortia agreements unlawful. If there were no BER for consortia, or if the current Consortia BER did not apply (e.g. due to exceeding the market share condition), an exemption under Article 101(3) TFEU may still apply.

[42] Prolonging regulation, Recital 1. See also Commission press release IP/14/717 of 24 June 2014 accessible at: http://europa.eu/rapid/press-release_IP-14-717_en.htm (last accessed: 6 May 2019).



2.4. Baseline

The point of comparison for the evaluation as regards the objective of the Consortia BER (to facilitate the creation and operation of consortia) is the hypothetical situation if there were no Consortia BER.[43] Without a BER for consortia, carriers could no longer rely on a general exemption of certain types of consortia agreements.

With respect to the evaluation of relevance criterion (see section 5.3 below) a different baseline has to be used. In evaluating whether the Consortia BER is still relevant it is examined whether consortia can still be considered economically efficient cooperation that also benefits consumers. Here the point of comparison for the evaluation is the state of the industry in year 2014 (just before the current intervention), when the Commission after examination considered consortia to be economically efficient cooperation that also benefits consumers. The evaluation relies on available data to track developments, in particular since 2014 to this day.

When adopted in 2009 the Consortia BER was based on and conditioned by the existence of efficiency gains and benefits to consumers, without providing any quantitative benchmarks for those two elements.[44] However, the Consortia BER contains safeguards (some of them quantitative) for sufficient competitive pressure (both inside and outside of a consortium) in order to ensure that a fair share of the benefits resulting from consortia will be passed on to consumers.[45]

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43 This point of comparison is hypothetical since before the current intervention started, there was another BER for consortia in place. It is also recalled that BERs for consortia have been continuously in place since 1995.

44 Consortia BER, Recitals 5-6.

45 See Consortia BER, Recitals 7-8. The Hardcore restrictions (Article 4) and Conditions relating to market share (Article 5) are examples of mechanisms ensuring intra and inter-consortia competition.

In accordance with the above, the Commission has applied the same methodology in its reviews of Consortia BER: assessing the continuous existence of efficiencies and their pass-on (absence of deterioration), rather than assessing their benchmark values. Similarly, in its last review of the Consortia BER the Commission reaffirmed that the efficiency gains and benefits, established at the adoption of that regulation, were still present at the time.[46] The same approach and point of comparison is applied in this evaluation, where the Commission looks at what has happened or changed in the market since 2014 and assesses whether these developments raise any concern that a fair share of efficiency gains or pass-on of benefits to consumers would not materialise any more.

[46] Prolonging regulation, Recital 1. See also Commission press release IP/14/717 of 24 June 2014 accessible at: http://europa.eu/rapid/press-release_IP-14-717_en.htm (last accessed: 6 May 2019).

3. THE IMPLEMENTATION OF THE CONSORTIA BER

The Consortia BER is a measure assisting in the enforcement of and compliance with Article 101 TFEU. The Consortia BER does not require the adoption of any implementing measures.

The Commission staff had regular opportunities to closely examine the state of competition in the liner shipping industry. For instance, in 2015 it participated in an OECD meeting on competition in the industry.[47] Several proceedings not directly connected to the Consortia BER were also conducted. In July 2016 the Commission adopted a decision making legally binding the commitments offered by 14 carriers to stop their practice of publishing their intentions on future price increases and to increase price transparency for customers thus reducing the likelihood of coordinating prices.[48] Moreover, investigations were also carried out in a line of 6 significant concentrations involving major carriers.[49] In all of these cases the Commission cleared the concentration, some subject to conditions.[50] Other investigations were carried out with respect to numerous smaller concentrations involving carriers and other companies on different levels of the logistics production chain (for example: terminals and logistic companies).[51] In all of these cases the notified concentrations were cleared by the Commission.

The Commission has not initiated proceedings[52] or taken any other formal action with respect to any carrier in connection with the Consortia BER.

In monitoring the applicable regulatory framework, the Commission has also forged ties with its regulatory counterparts internationally[53], recognising the importance of

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47 See e.g. European Commission, "Competition Issues in Liner Shipping – European Union", written contribution submitted for Item IV of the 59th meeting of the OECD's Working Party No. 2 on Competition and Regulation on 19 June 2015. Available on http://ec.europa.eu/competition/international/multilateral/2015_june_liner_shipping_en.pdf (last accessed: 26 March 2019).

48 See Commission press release IP/16/2446 of 7 July 2016. Accessible on http://europa.eu/rapid/press-release_IP-16-2446_en.htm (last accessed: 26 March 2019).

49 Case No COMP/M.7268 - CSAV/ HGV/ KÜHNE MARITIME/ HAPAG-LLOYD AG, Commission decision of 11 September 2014; Case M.7908 - CMA CGM / NOL, Commission decision of 29 April 2016; Case M.8120 - HAPAG-LLOYD / UNITED ARAB SHIPPING COMPANY, Commission decision of 23 November 2016; Case M.8330 - MAERSK LINE / HSDG, Commission decision of 10 April 2017; Case M.8472 - NIPPON YUSEN KABUSHIKI KAISHA / MITSUI OSK LINES / KAWASAKI KISEN KAISHA / JV, Commission decision of 28 June 2017; Case M.8594 – COSCO SHIPPING / OOIL, Commission decision of 5 December 2017.

50 Conditions were attached to the Commission decisions in cases M.7268, M.7908, M.8129 and M.8330.

51 See for example: M.9221 CMA CGM / CEVA, Commission decision of 06.02.2019; M.9093 DP WORLD INVESTMENTS / UNIFEEDER, Commission decision of 04.12.2018; M.9016 CMA CGM / CONTAINER FINANCE, Commission decision of 22.10.2018; M.8459 TIL / PSA / PSA DGD, Commission decision of 12.09.2017.

52 Article 11(6) of Council Regulation (EC) No 1/2003 and Article 2 of Regulation 773/2004.

maintaining an international overview of the liner shipping sector and in the spirit of global cooperation.

Besides, the competition authorities of the Member States may take actions with respect to the Consortia BER when they apply Article 101 TFEU[54] or they may withdraw the application of Consortia BER in individual cases.[55] Moreover, the EU and the Member States courts may be called to adjudicate on the Consortia BER in cases where actions of the competition authorities are challenged or when damages due to breach of Article 101 TFEU are claimed. However, according to information received from the competition authorities of the Member States, no such cases were handled by them or by the courts of the Member States.

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53 In particular, DG Competition has entertained structural dialogue together with the United States Federal Maritime Commission and the Ministry of Transport of the People's Republic of China.

54 Council Regulation (EC) No 1/2003, Article 5.

55 Council Regulation (EC) No 1/2003, Article 29(2).

4. EVALUATION METHODS

4.1. Method for data collection[56]

The **Roadmap of the Evaluation** was published on the Commission's Consultation website on 7 May 2018 after which a four-week consultation was open for public feedback until 4 June 2018.[57]

The Commission received three responses to the Roadmap: a response from CLECAT, a joint response by WSC, ECSA and ICS and a response from an anonymous source.[58] The common procedural comment from the responses was that the consultation period (for the public and targeted consultations, described under Sections 5.2. and 5.3.) should run longer or finish later than indicated in the Roadmap and run at least until end of 2018. The Commission took these comments into account to the extent possible and compatible with its overall procedural schedule.

From 27 September to 20 December 2018 the Commission ran an online **Public Consultation** on the Consortia Block Exemption Regulation in three official languages.[59] The Public consultation was published on the Commission's website for legislative initiatives as well as the designated website of DG COMP, and was accompanied by a press release.[60]

In October 2018 the Commission sent also three separate types of **Targeted questionnaires** to several stakeholders (Targeted Questionnaire for Carriers, Targeted Questionnaire for Shippers and Freight-forwarders, Targeted Questionnaire for Port operators), as well as emails to all NCA's through the European Competition Network (ECN), informing them about the ongoing evaluation and inviting them to take part in the public consultation as well as to submit any observations.

As part of the evaluation, the Commission has conducted its own internal study of the liner shipping market and its developments, analysing e.g. relevant merger decisions, looking at guidance documents, etc. The Commission has also used several sector-specific reports, of which in particular the reports of the OECD's ITF "Impact of alliances in container shipping", 2018 ("ITF Report")[61] and "Container Shipping in

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56 From hereinafter the term "data" shall be used as to represent all facts and statistics collected together for reference or analysis, regardless of their format or size, whether they represent raw, numerical data or processed information.

57 The consultation website and Roadmap are accessible at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2422025_en (last accessed: 3 April 2019).

58 The responses and accessible at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2422025/feedback_en?p_id=229482 (last accessed: 12 December 2018).

59 English, German and French.

60 The press release is accessible at: http://europa.eu/rapid/press-release_IP-18-5921_en.htm (last accessed 3 December 2018).

61 OECD International Transport Forum, The Impact of Alliances in Container Shipping, 2 November 2018, accessible at: https://www.itf-oecd.org/impact-alliances-container-shipping (last accessed: 26 March 2019).

Europe", 2018 ("ITF EU Report");[62] the OECD Secretariat Note "Competition Issues in Liner Shipping"[63], and the UNCTAD report "Review of Maritime Transport 2018".[64]

Several bilateral meetings were organised with requesting stakeholders. Commission staff also participated to a number of forums and conferences on the matter: conferences organised by European Commission's DG EMPL on 7 November 2018 and 15 December 2019, and by DG MOVE, on 14 December 2018; conference organized by the ITF on 8 February 2019; conference organised by ESC on 20 March 2019.

4.2. Assessment method

The evaluation consist of the interrelated assessments of whether the Consortia BER fulfils the criteria: Effectiveness, Efficiency, Relevance, Coherence and EU added value. For their assessment, the five criteria were elaborated into evaluation questions. The assessments draw from the collected data and knowledge.

The Commission assessed the collected data based on its relevance and credibility. The Commission first sieved through the responses and identified which data are relevant for the evaluation.[65] Those data, which exceeded the scope of the objectives of the evaluation of the Consortia BER[66] or have limited relevance with the objectives of the Consortia BER or its impact, would receive subsidiary consideration. Conversely, any data which would for example pertain to benefits (or absence thereof) of consortia agreements (and their pass-on to customers) would receive more weight in the evaluation. Generally, the Commission considered data which were supported by quantitative information and figures, or references to external (verified or verifiable) sources as more reliable. Generally, data which was corroborated by several credible sources or references, were given most weight in the assessment.

4.3. Limitations to the methodology

The evidence basis of this evaluation is to a large extent made of input of stakeholders.

[62] OECD International Transport Forum, Container Shipping in Europe, Data for the Evaluation of the EU Consortia Block Exemption, 19 March 2019, accessible at: https://www.itf-oecd.org/container-shipping-europe-data-evaluation-eu-consortia-block-exemption-regulation (last accessed: 26 March 2019).

[63] OECD Secretariat, Note: Competition in Liner Shipping, 19 June 2015, accessible at: http://www.oecd.org/daf/competition/competition-issues-in-liner-shipping.htm (last accessed 11 December 2018).

[64] UNCTAD, Review of Maritime Transport 2018, accessible at: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2245 (last accessed: 2 April 2019).

[65] "Data relevant for the evaluation" imply data and information which pertain to the remits of competition law, the objectives of the Consortia BER and to our mandate for the evaluation. Conversely, data which pertain exclusively to labour law issues or issues of commercial contracts could not be considered as immediately relevant for the evaluation.

[66] The objectives of the evaluation of the Consortia BER were identified in the Evaluation Roadmap.

The limitations regarding the collection and analysis of data which apply to this evaluation can be divided into three types.

The first type consists in the objective limitations of data collection, meaning the limitations which pertain to the nature of business and data, and are not a consequence of a chosen method or its execution. Such limitations were most pertinent to the collection of overall service price and the calculation of precise market shares. While some elements of prices for liner shipping services are publicly available, the final prices and surcharges are terms of individual contracts, which represent business secrets. Consequently, the overall (final) prices cannot be established or calculated with precise certainty. Similarly, it was not possible to calculate carriers' market shares with full precision. This is due to the possible divergence between capacity and volume figures (known only to individual carriers), and to the fact that the information is not granulated enough to have accurate market share calculations. Some stakeholders have pointed out that this limitation leads to some studies double counting the market shares from consortia when calculating a carriers' market share. However, considering information received in the context of its activities in the sector[67], i.a. merger control decisions, this first type of limitation is not expected to have any material impact on the evaluation.

The second type of limitations consists in other limitations related to the collection of data. In particular, respondents contributing to the public consultation may not be fully representative of all stakeholders (for example, a low number of responses received may not be a representative sample of the entire group). However, responses were received notably from sectoral organizations (e.g. WSC, ESC, FEPORT, ESPO, CLECAT, ETA, GSF and others) with wide sector-based memberships. They were analysed alongside the responses from individual stakeholders. For this reason this SWD refers to responses and views in a qualitative manner (referring to the analysis of the responses, the views given therein and the common, shared opinions per stakeholder group) and not in a quantative manner (e.g. by stating number of views or responses behind an idea).

Lastly, the third type of limitations relates to the difficulty in establishing and assessing causal links, if any, between factors. When confronted with these limitations, an effects-based analysis was used, e.g. whether the alleged causal links would have had positive, neutral or negative effects on customers.

[67] No academic evidence has been identified in the context of the Evaluation on this issue.

5. ANSWERS TO THE EVALUATION QUESTIONS AND ANALYSES

5.1. Effectiveness

The question on effectiveness focuses on whether, considering the major developments in the industry, the Consortia BER still facilitates the creation and operation of consortia that meet certain conditions (by providing legal certainty).

As described in more details in the Synopsis Report, the carriers and their associations that responded to the public consultation explain that they are typically members of a large number of consortia agreements that are frequently replaced or amended and therefore require regular assessment of compliance with competition rules. They consider that the Consortia BER is a clear and easy instrument to apply in-house (without external legal advice) and that it provides a high level of legal certainty. They argue that in its absence legal uncertainty and increased legal fees (due to the need to conduct complex self-assessment) will have a chilling effect on consortia, mostly on the smaller ones. Their self-assessment could rely on other sources, such as the Commission's guidelines (Commission Horizontal Guidelines,[68] the Article 101(3) Guidelines,[69] and the Specialisation Regulation[70]), enforcement practice and case law, only to a very limited extent.

Responding customers and their associations are of the view that the Consortia BER does not provide them with certainty regarding the legality of consortia because carriers do not publish their self-assessment.[71] Responding customers, ports and their associations also considered that following the changes in the industry the Consortia BER cannot provide anymore legal certainty to consortia. This specific argument however will be discussed in the section on "Relevance" below.

The Consortia BER's aim is to facilitate consortia by providing them with legal certainty with respect to their compliance with Article 101 TFEU. Just as it is the case with any economic enterprise, the assessment of legal compliance and legal risks are important considerations before entering into consortia agreements. The Consortia BER provides guidance on the conditions under which consortia agreements would be compatible with Article 101 TFEU. The Consortia BER is tailored to consortia agreements, referring to arrangements that are specific to consortia. It also employs industry-specific terminology that is easily understandable to industry participants. Other sources that provide guidance

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68 Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C11, 14.1.2011, p. 1.

69 Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance) OJ C 101, 27.4.2004, p. 97–118.

70 Commission Regulation 1217/2010/EU of 14 December 2010 on the application of Article 101(3) TFEU to certain categories of specialisation agreements, OJ L 335/43, 18.12.2010.

71 While not explained in their replies, customers and their associations could consider that legal certainty as provided by the Consortia BER would be of importance e.g because they would like to understand whether their contractual partners' behaviour is legal.

on the application of Article 101 TFEU such as Commission's guidelines (Commission Horizontal Guidelines, the Article 101(3) Guidelines and the Specialisation Regulation), enforcement practice and case law do not refer specifically to consortia and their application to consortia agreement must be deduced by analogy and interpretation. Such an approach cannot provide the same level of legal certainty as the Consortia BER that was tailored specifically to consortia, and is also more complex, requiring higher degree of expertise in competition law. In turn, this may require carriers to seek the advice of external experts and may leave a degree of uncertainty given the need for legal interpretations. It therefore cannot be performed with the same facility as the application of the Consortia BER.

Regarding publication of the self-assessment made by consortium members, such documents would typically discuss confidential business information and could not be made public. Besides, where stakeholders have ground for concern with respect of the compatibility of consortia with Article 101 TFEU they may complain to the Commission.

Therefore, compared to a baseline in which the Consortia BER is absent, it is concluded that the Consortia BER facilitates the conclusion of consortia agreements by making the assessment of their compatibility with Article 101 TFEU easier, and by providing higher legal certainty that decreases legal risk.[72]

5.2. Efficiency

The Commission uses this criterion to assess the effect of the Consortia BER on costs. In particular, for this evaluation, information was sought on whether the Consortia BER helps undertakings to reduce costs or conversely whether it increases compliance costs.[73]

Consortia agreements appear to be very dynamic, meaning new consortia agreements are frequently signed and the terms of existing agreements often change.[74] Market conditions and market shares of carriers and their consortia on the various geographic markets are also dynamic and change over time. Carriers are, therefore, expected to regularly self-assess the compatibility of their consortia agreements with the Consortia BER and Article 101 TFEU.[75] Consequently, for all carriers involved in consortia, compliance costs exist on a continuous basis.

As described in more details in the Synopsis Report, all respondent carriers consider that assessment under the Consortia BER is relatively simple, can be done in-house, and generates little cost. In practice, a quick check of a (planned) consortium agreement and its characteristics (incl. market shares) versus the limited number of conditions specified

[72] It should be noted however that it is difficult to quantify the facilitating effect of the Consortia BER; some information on the Consortia BER cost savings is provided below in the section on "Efficiency". There is no information regarding the precise number of consortia agreements that were concluded but would not have been in the absence of the Consortia BER.

[73] "Efficiency" as a criterion in an evaluation exercise is therefore different from Efficiency Gains for the purpose of Article 101(3) TFEU that were explained above.

[74] Submission of WSC and others of 20 December 2018, pp. 21-22.

[75] Ibid.

in the Consortia BER is sufficient. Without the Consortia BER, a more complex and expensive assessment would be required involving external lawyers and increasing costs. It is, however, difficult for carriers to quantify the expected costs increase. Only one carrier responding to the consultation estimated that an external assessment (with an economic study) for a new consortium could cost more than EUR 200 000 (to be shared between the parties), while a self-assessment under the Consortia BER could cost as little as EUR 1000.

The respondent carriers argue that the increased assessment costs may discourage the small carriers from entering into consortia agreements. Moreover, the relatively short time needed for self-assessment under the Consortia BER allows carriers to adjust their strategies more swiftly to market changes as well as to reply quicker to new market opportunities.

As noted above in Section 5.1, the Consortia BER is specific to this type of cooperation and uses terminology specific to it. It follows that the assessment of a consortium on the base of the Consortia BER is simpler and quicker compared to an assessment based on other existing instruments providing general guidance on the application of competition rules. This in turn allows carriers to enter easier and faster into new consortia agreements and, as a consequence, better reply to market changes and benefit from new opportunities which would eventually benefit customers through e.g. lower prices.

Conversely, in the absence of the Consortia BER, the assessment of consortia compliance with competition rules may become more complex, thereby affecting the costs associated with self-assessment and possibly requiring the advice of external lawyers.

Although the carriers have not provided very precise figures on the expected increase in the cost of compliance assessment, it is clear that such cost would increase in the absence of the Consortia BER. This increase could be principally significant for small and medium carriers, for which it is more difficult to operate in the sector that is characterised by a general low profitability (see Section 5.3.5.1).[76]

Therefore, it is concluded that the Consortia BER is efficient as it helps carriers to reduce costs.

5.3. Relevance

The criterion of relevance focuses on the question whether the Consortia BER is still relevant considering the major developments in the industry and the modes of cooperation between carriers. As the Consortia BER aims to facilitate consortia, the consortia BER remains relevant as long as consortia generate efficiency gains a fair share of which would benefit consumers.

As described in more detail in the Synopsis Report, carriers and vessel owners consider that cooperation in consortia is the mainstay of the industry and that this fact is not likely

[76] See also Brooks, Meersman, Sys, Voorde, Vanelslander: Technical Report "Regulation in the liner shipping industry: pathways to a balance of interests", June 2019, p. 24: "*Such self-assessment of single or multiple trade co-operations means increased risk and increased legal compliance costs. For the small- and medium-sized carriers that are the backbone of smaller trade lanes, a case-by-case approach may create transition costs.*"

to change anytime soon. Most are therefore of the view that the Consortia BER is still very much relevant. The carriers consider that consortia generate efficiency gains: consortia allow carriers to achieve economies of scale and rationalise their services resulting in lower prices for customers and better services in terms such as numbers of routes, ports of call and reliability. The carriers' view is that customers also benefit from strong competition between consortia and between members of the same consortia.

Customers and ports on the other hand consider that, in view of the changes in the industry the Consortia BER has lost its relevance. They consider that the industry has become too concentrated and that this change combined with the deployment of ultra large container vessels ("ULCVs") resulted in significant deterioration in the quality of services provided by carriers which results in increased costs to customers. Customers' opinions diverge on the level of price competition in the industry but overall customers seem to suggest that there is some degree of price competition.

Ports complain about the bargaining power of alliances, and note that accommodating the alliances' ULCVs requires them to make high investments that they consider risky (because the alliances can change ports or lower frequencies of call); ULCVs would also cause some disturbance: when a ULCV arrives, it creates a peak period in activity that causes congestion, and delays that ultimately adversely affect customers. Thereinafter follows a period of underutilisation of resources until the next ULCV arrives.[77]

It is however acknowledged by the respondent customers, port and terminal associations that cooperation in consortia will remain important to the liner shipping industry in the future.

5.3.1. Prevalence of consortia

First, it appears undisputed among the respondents that reliance on cooperation between carriers has been made more pressing by over-capacity, low prices, and low profitability because, as it will be explained below, consortia allow carriers to rationalise services, achieve economies of scale and reduce costs. Consortia will therefore continue to play a major role in the sector in the medium term.

Secondly, according to the information provided by the WSC, 61 consortia operate in the EU in addition to the three alliances.[78] A material number of these consortia appear to fall within the scope of the Consortia BER. Indeed, there are at least 9 consortia with respect to which it could be said with certainty that their market shares are below the 30% ceiling and additional 20 consortia that may be below that ceiling (and 7 consortia only would have with certainty a market share above 30%).[79]

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77 See Synopsis Report; ITF Report, p. 55.

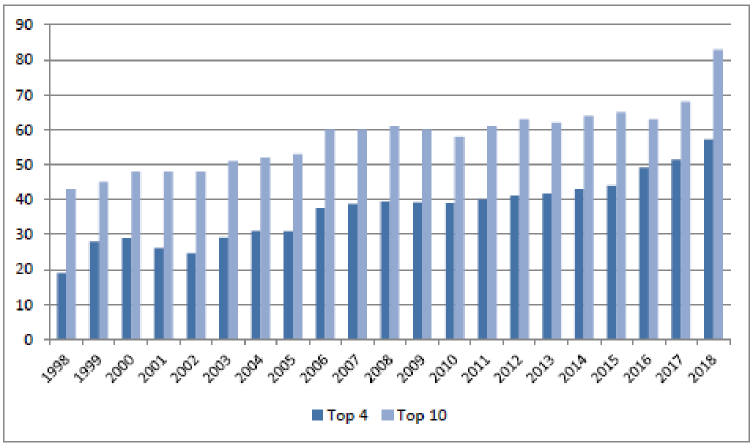
78 Submission of WSC and others of 20 December 2018, p. 5 and Annex1.

79 ITF EU Report, p. 13 and Annex 1. As explained in this report, it is however difficult to estimate the exact market shares of consortia due to the lack of accurate data on transported volumes and the complex network of cross- membership between consortia.

5.3.2. Concentration levels

There is no doubt that the level of concentration in the liner shipping has increased in recent years, as shown Chart 1 below:

Chart 1: Concentration rate (combined global capacity market share in %) in container shipping 1998-2018[80] *- Top 4 and top 10 carriers*



Source: ITF report based on data from Alphaliner (1996-2018)

The WSC argued (on the basis of the individual market shares of the largest 12 carriers) that HHI levels[81] in the industry are below 1000 and that according to recital 19 of the Horizontal Merger Guidelines[82] such level is unproblematic.[83]

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[80] ITF report, Figure 8. The concentration rate refers to the share of global capacity in terms of TEUs of the top 4 and top 10 carriers.

[81] The Herfindahl-Hirschman Index (HHI) is a measure of the concentration of a market. It is calculated by summing the squares of the individual market shares of all the firms in the market.

[82] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p.5.

[83] Joint submission of the WSC and others of 20 December 2018, Annex 1, p. 13.

Table 1: Global capacity shares largest 12 carriers[84]

APM-Maersk	17.70%
MSC	14.50%
COSCO	12.40%
CMA CGM	11.60%
Hapag-Lloyd	7.10%
ONE	6.70%
Evergreen	5.20%
Yang Ming	2.80%
PIL	1.80%
HMM	1.80%
ZIM	1.50%
Wan Hai	1.10%

Source: WSC based on Alphaliner

However, for the purpose of the Consortia BER, the relevant parameter for the application of the Consortia BER is the market share of the consortium calculated as the sum of the share of each of its individual members of the relevant market including those shares achieved outside of the consortium.[85]

Moreover, according to the ITF EU Report *"within the past five years, alliances have become the dominant players on the main East-West routes involving Europe (North Europe, Asia-Med, North Europe-North America East Coast and Med-North America East Coast). Until 2015, all alliances taken together had market shares below 50% on all of these four trade lanes, ranging from 49% (Asia-North Europe) to 0% (Med-North America East Coast) in the last quarter of 2014. This changed in 2015, with the arrival of the 2M and O3 Alliances. The market share of non-alliances has decreased further in 2017 when container shipping witnessed the transition from four to three liner shipping*

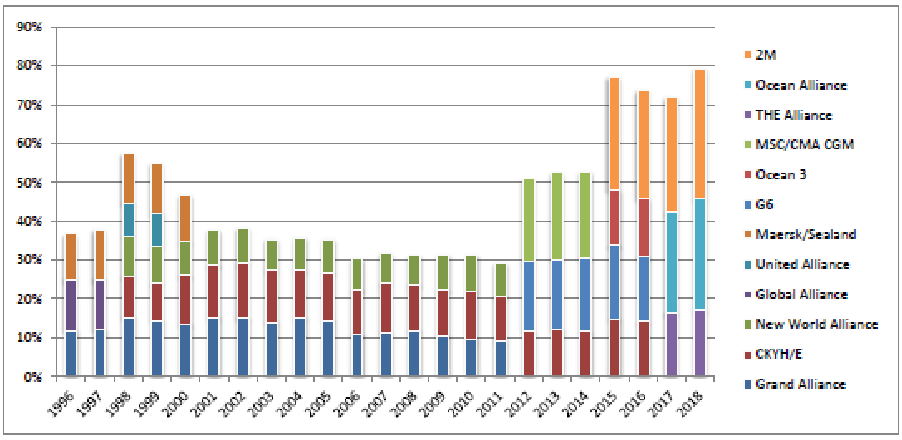
84 Joint submission of the WSC and others of 20 December 2018, Annex 1, Table 2.

85 A similar (although not identical approach) is used in merger cases where is was said that "*In its decisional practice in this sector, the Commission however considered that it was not appropriate to assess the effects of a concentration only on the basis of the Parties' individual market shares. Such an approach would not adequately take into account that a member of an alliance/consortium, even when carrying limited volumes, can have a significant influence on operational decisions determining service characteristics, in particular capacity, over a much larger part of the market, i.e. that corresponding to the entire alliances/consortia of which it is a member.(fn omitted) This influence can have a dampening effect on competition on those trades served by the alliances/consortia in question. Therefore, for the assessment of this case and in line with the Commission's past practice, the aggregate shares of the Parties' alliances/consortia and all their members will also be taken into account, thus reflecting the more limited competitive constraints that the Parties' partners exert on them. Conversely, the part of the market, over which the Parties have no influence, i.e. corresponding to carriers that are not members to any of the Parties' alliances/consortia (the "free market"), will be viewed as fully competing with the Parties in the respective trade.*" See e.g. M.8594 COSCO SHIPPING / OOIL, Commission decision of 5/12/2017, paras. 32 - 33.

alliances. This transition in 2017 has also resulted in larger market shares for the remaining alliances.''[86]

The period under review has indeed seen the emergence of three large global alliances: 2M, Ocean Alliance, and THE Alliance.

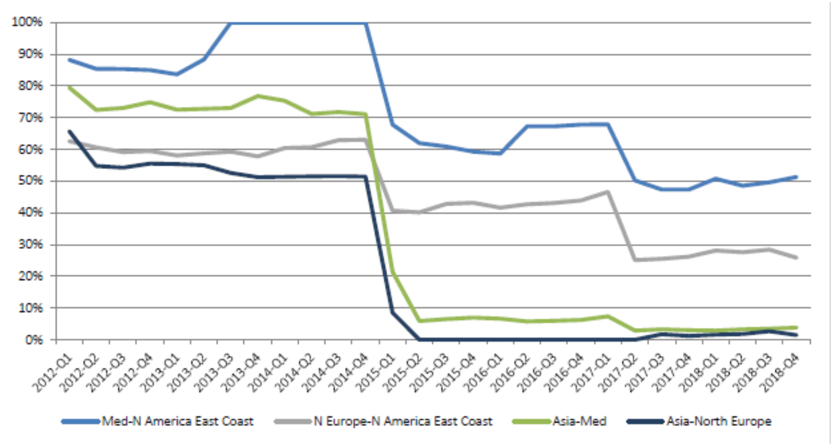
Chart 2: Global market share (container carrying capacity) of global alliances (1996-2018)[87]



Source: ITF report based on data from Alphaliner (1996-2018)

Conversely, market shares of non-alliance carriers have fallen materially.

Chart 3: Market shares of non-alliances on main European trade lanes, per quarter (2012-2018)[88]



Source: ITF based on data from Sea Intelligence

86 ITF EU Report, p. 5.

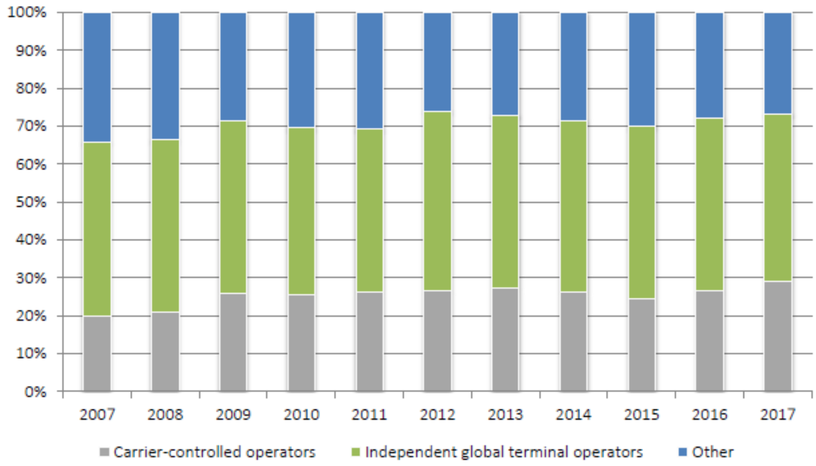
87 ITF report, Figure 1.

88 ITF EU report, pp. 5-6. The market shares are based on fleet capacity deployed by alliances on these trade lanes, so these shares do not represent the actual TEU volumes transported by alliances on these trade lanes.

More specifically, looking at trades, the 2M and the Ocean alliance enjoy market shares above the 30% ceiling set in the Consortia BER on the key trades between Asia and the EU (Northern Europe and Mediterranean).[89]

Regarding vertical concentration, many carriers have over the last decade acquired stakes in terminals resulting in an increase of the global market share of carrier-controlled terminals from 18% in 2001 to 38% in 2017.[90] This includes dedicated terminals[91] and multi-user terminals.[92] In Europe the share of carriers in terminal operations is now slightly below 30%, but only slightly higher than in 2014 at the start of the evaluation period, indicating limited changes over the evaluation period.[93]

Chart 4: Types of terminal operators in Europe (volume shares, 2007-2017)[94]



Source: ITF based on Drewry 2008-2017

The changes do not appear to have had negative effects on liner shipping prices because they have actually decreased during that period in close correlation to the decrease in carriers' costs.[95]

89 ITF EU Report, Figures 2-5.

90 See ITF report, p. 45: During 2001-2017, the share of independent private terminal operators has remained stable, whereas the share of other operators, in particular public port authorities operating terminals, has declined.

91 Dedicated container terminals are terminals dedicated to the traffic of one or more carriers. These are usually subject to a private agreement between one or more carriers and a port operator or authority.

92 Multi-user terminals are terminals that are open to all carriers that would like to use it, so not for exclusive use of the carrier controlling the terminal.

93 With respect to vertical integration, a concern was raised by freight forwarders that carriers are increasingly competing with freight forwarders and may gain unfair competitive advantage over them through exchanges of information between members of consortia on customers and cargo. These concerns were not substantiated with robust evidence that such exchanges actually took place or are likely to take place. It is recalled that in any case exchanges of commercially sensitive information between competitors is covered by Section 2 of the Horizontal Guidelines.

94 ITF EU Report, Figure 10.

Further, on vertical relationships, ports/terminal operators, few vessel owners (chartering out vessels to the members of the alliances) and tug boat operators complain about the increasing bargaining power of the alliances that would allow the latter to negotiate very low charges.[96] This concern is mainly directed towards the alliances, the two biggest of which (2M and Ocean Alliance) do not enjoy in any case the benefit of the Consortia BER on their key trades, and is therefore outside the scope of this evaluation.

In addition, joint purchasing of inputs upstream may lead to lower prices or better quality products or services for consumers.[97] Joint purchasing typically raises competition concerns when the parties enjoy significant degree of market power on the downstream selling market which allows them not to pass-on to consumers the lower purchase prices they achieve.[98] As shown in Section 5.3.5 below, a fair share of the efficiencies gained by consortia have been passed on to customers.

With respect to ports and terminals, seven out of the nine carriers that have responded to the targeted questionnaires stated that they negotiate individually charges with terminals and not collectively with the other alliance or consortia members; the same statements was also supported by one port authority.[99] The two remaining carriers, both members of the same alliance, confirmed that they would negotiate collectively, but this would then depend on the preference of the terminal operator and that sometimes it is not even in the interest of the individual carriers to negotiate collectively as an alliance.

It is therefore not apparent that over the evaluation period the Consortia BER would have increased the bargaining power of carriers towards the ports and terminals, to the detriments of customers.

5.3.3. ULCVs

As highlighted by stakeholders in response to the evaluation questionnaires, an important development in recent years has been the increase in the average size of container vessels and the trend towards ULCVs which are deployed by the alliances in particular on the east-west trades.

Chart 5: Average vessel size by trade: 2010-2018[100]

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95 Submission of WSC of 14 March 2019, figure 1. For further analysis see Section 5.3.5.1.

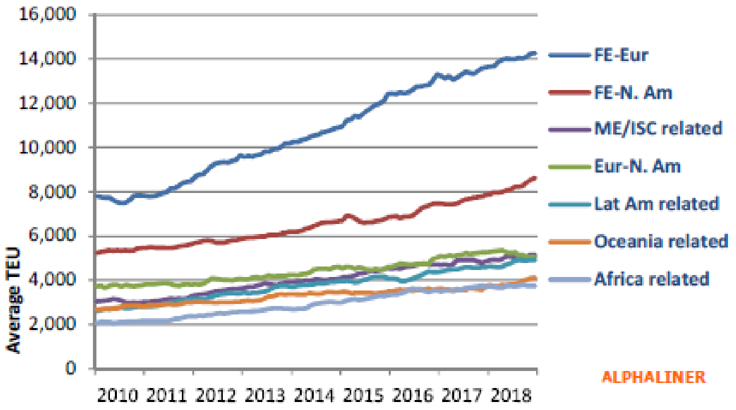
96 SWD Annex 1: Synopsis report, p. 6.

97 Horizontal Guidelines, paragraph 194.

98 Horizontal Guidelines, paragraph 201.

99 Response of an anonymous port authority, Germany, to the public questionnaire, question 22.

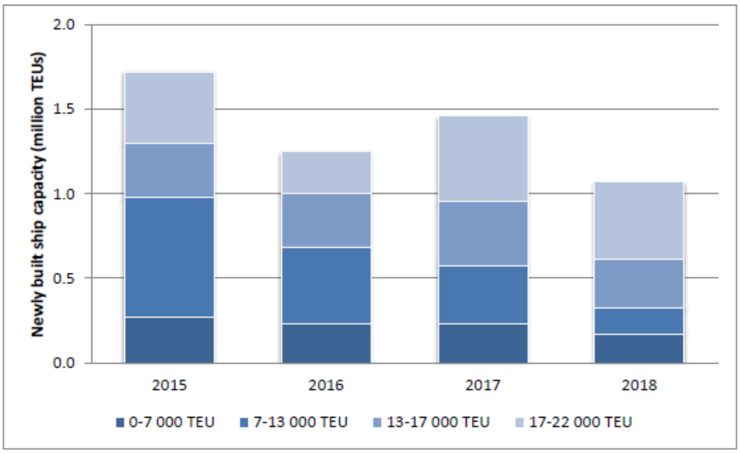
100 Alphaliner, Vol. 2018/51 (12.12.2018 to 18.12.2018), p. 2.



Source: Alphaliner

This trend is expected to continue in the medium term, for instance as orders for new ULCVs (and even bigger vessels) represented in 2017 and 2018 the largest group of orders:

Chart 6: ULCVs' share of container ship orders[101]



Source: ITF based on data from Clarksons Research

Ports / terminal operators and customers, among the respondents expressing a view on the effects of UCLVs, argue that the deployment of ULCVs by the alliances raises challenges and disturbances to terminals in terms of infrastructure investment, congestion and delays.[102] However, they provided neither precise evidence on the extent and impact of such disturbances, nor any robust indication of a causal link between the alleged challenges and disturbances and the functioning of the Consortia BER over the evaluation period.

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101 ITF Report, Figure 2.

102 SWD Annex 1: Synopsis report, p. 6.

Besides, Charts 5 and 6 indicate that the average size of vessels has been on the increase already before the formation of the current three alliances. Maersk for example ordered 20 ULCVs in 2011 when it was not yet a member of any alliance.[103]

It is recalled that ULCVs are essentially used on the Europe-Asia trades, in particular by the two alliances, which fall outside of the scope of the Consortia BER. The deployment of ULCVs is therefore of limited relevance to the evaluation of the Consortia BER.

To conclude, over the evaluation period, no clear evidence of a direct link between the Consortia BER and the ordering/use of ULCVs has appeared in the evaluation.

5.3.4. Efficiency gains

Since the adoption of the first Consortia BER in 1995[104] and until its latest prolongation in 2014, the Commission's consistent view has been that consortia covered by the BER generate efficiency gains.

In the Consortia BER and at the occasion of its last prolongation, the Commission considered that consortia have generally helped to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilisation of port facilities. They have also helped to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity.[105]

These efficiency gains of the consortia covered by the BER were confirmed in the Public Consultation by the respondent carriers also for the period relevant for this evaluation[106] and were not materially contested by the other stakeholders.[107] In general, consortia allow their members to pool their vessels together and provide services or frequencies that carriers would not be able to provide on their own means. A larger pool of vessels could also allow for optimisation of the deployment of vessels to better fit size and type to the conditions of the service.

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[103] See for example: Janet Porter "Maersk expects to limit Triple-E fleet to 20 vessels", Lloyds List, 27 June 2011, accessible at: https://lloydslist.maritimeintelligence.informa.com/LL011121/Maersk-expects-to-limit-TripleE-fleet-to-20-vessels (last accessed: 26 March 2019).

[104] Commission Regulation (EC) No 870/95 of 20 April 1995 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No 479/92, OJ L 89, 21.4.1995, p. 7–14.

[105] Consortia BER, recital 5.

[106] Additional submission by the WSC available on http://www.acceptance.ec.europa.eu/competition/consultations/2018_consortia/wsc2.pdf; MSC's response to the Targeted Questionnaire, question 15.

[107] It was noted above that some stakeholders are concerned by the externalities created by UCLVs at ports leading to disturbances and inefficiencies. It was explained however above that no clear evidence of a direct link between the Consortia BER and the ordering/use of ULCVs has appeared in the evaluation.

Cargo consolidation is also an important efficiency gain. For a vessel to be operated profitably it has to reach a certain level of space utilisation; a higher utilisation also means lower cost per container. A vessel may wait in a port or call at several ports until the required level of utilisation is reached. A consortium serves the customer base of all its members allowing higher utilisation of the vessels which increases profitability and reduces cost per container. Transit times are shortened because the vessels wait less time or call at fewer ports before they reach the required level of utilisation. This means that less vessels are required to provide the same frequency of service and they can be deployed on other routes or used to increase the frequency. Cargo consolidation also facilitates investment in more modern (normally larger) cost-efficient vessels because it is easier to fill and operate them profitably.

5.3.5. Benefits for consumers

5.3.5.1. *Prices*

It appears that users of the shipping services provided by consortia generally could benefit from a fair share of the improvements in productivity which consortia bring about.

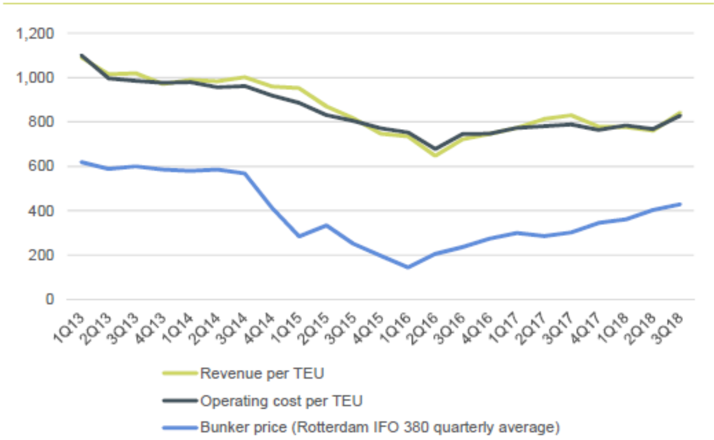
Those benefits might take the form of lower prices due to the reduction in carriers' costs, an improvement in the frequency of sailings and port calls, or an improvement in scheduling as well as better quality and personalised services through the use of more modern vessels and other equipment, including port facilities.[108]

As noted above, the customers responding to the public consultation consider that concentration in the market has increased significantly since the last prolongation of the Consortia BER and that consequently competitive pressures in the market are not sufficient to ensure that they enjoy a fair share of the benefits generated by consortia.

As shown in Chart 7 below prices for customers of the liner shipping industry have in fact diminished in recent years alongside costs to carriers. The decrease in both costs and prices, with low profitability of the carriers, demonstrates that competitive constraints on the carriers are still strong enough to pressure carriers to transfer a fair share of the efficiency gains they have generated to customers in the form of lower prices.

[108] Consortia BER, recital 6; Additional submission by the WSC available on http://www.acceptance.ec.europa.eu/competition/consultations/2018_consortia/wsc2.pdf.

Chart 7: Development of revenues and costs (USD per TEU) and bunker prices (USD per tonne)[109]



Source: WSC based on Drewry Maritime Research

Chart 7 indicates also that, at Q3 2018 both revenues and costs per TEU remain below Q1 2013, with revenues per TEU being 23% lower compared to Q1 2013 and operating costs per TEU being 25% lower.

This view on price evolution is shared by industry analysists; Alphaliner for example stated that "*Real container freight rates, after accounting for changes in the price of bunker, have fallen by more than 50% in the last 20 years. While average nominal freight rates… have fallen by over 20% since the beginning of 1998, inflation-adjusted freight rates have shown an even larger reduction, as bunker prices have increased more than five-fold since 1998….the savings from operational and organisational efficiencies in the last two decades have mostly been passed on to shippers in the form of lower freight rates - both in nominal and in real terms.*"[110] This adds to the picture described for example by UNCTAD as *"difficult market conditions faced since the 2008 global financial crisis. For many years, container shipping has struggled with low freight rates, dwindling earnings and poor financial returns."*[111]

To conclude, the nearly identical decrease of costs and prices, with low profitability of the carriers, demonstrates in particular that cost efficiencies have been passed on to customers to a material extent over the evaluation period.

No substantial indication of changes in circumstances in the short-medium term were found.

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[109] Submission of WSC of 14 March 2019, Figure 1.

[110] See for example Alphaliner, Vol. 2018/23 (30.05.2018 to 05.06.20), p. 1.

[111] UNCTAD Policy Brief No. 69, September 2018 "Market consolidation in container shipping, what next?", page 1. See for example: Alphaliner, Vol. 2019/18 (24.04.2019 – 30.04.2019), pp. 1; Alphaliner, Vol. 2019/1 (27.12.2018 – 02.01.2019), pp. 1-2; Alphaliner, Vol. 2018/18 (24.04.2018 – 30.04.2018), pp. 1; Alphaliner, Vol. 2017/52 (20.12.2017 – 26.12.2017), pp. 1-5; Alphaliner, Vol. 2017/1 (28.12.2016 – 03.01.2017), pp. 1-2; Alphaliner, Vol. 2016/1 (30.12.2015 – 05.01.2016), pp. 1-2.

5.3.5.2. Services

Data available on services does not appear to support the claim made by customers and their associations that competition has not functioned well in the market over the evaluation period, compared to the past.[112]

The quality of services in the liner shipping industry is commonly measured in parameters of connectivity, availability of services, and reliability.

According to the ITF EU Report, the number of direct port-to-port pair connections on European trade lanes has declined since 2012. On the Asia-North Europe trade, the number of distinct port pairs dropped from approximately 210 in March 2014 to 189 in September 2018 and on Asia - Mediterranean from approximately 330 in March 2014 to 294 in September 2018.[113] The WSC on the other hand submitted that between 2013 and 2018 on the Asia – North Europe trade, the number of unique ports called actually increased from 45 (20 in North Europe, 25 in Asia) to 47 (24 in North Europe, 23 in Asia) and the number of countries called increased from 19 (12 in North Europe, 7 in Asia) to 22 (14 in North Europe, 8 in Asia).[114] In addition, the WSC notes that the UNCTAD connectivity index improved for all 21 EU countries measured between 2013 and 2018.[115]

According to the ITF EU Report the number of weekly services between Asia and Europe decreased between 2014 and 2018: from 14 to 11 on Asia – Mediterranean and from 20 to 17 on Asia – Northern Europe,[116] although at least with respect to the latter the WSC identified 4 independent services in addition to the 17 provided by the three alliances.[117]

On the transatlantic trades the ITF EU Report notes between 2014 and 2018 a decrease from 14 to 12 weekly services between Northern Europe and the US' east coast but an increase from 7 to 9 weekly services between the Mediterranean and the US' east coast.[118]

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[112] See Section 5.3 above.

[113] ITF EU Report, page 31.

[114] WSC submission of 14 March 2019, Table 1.

[115] WSC submission of 14 March 2019, pp. 4-6. The UNCTAD Liner Shipping Connectivity Index (LSCI) is generated from five components: (a) the number of ships; (b) the total annual container-carrying capacity of those ships; (c) the maximum vessel size; (d) the number of services; and (e) the number of companies that deploy container ships on services from and to a country's ports. The data are derived from Containerisation International Online (until 2015) and MDS Transmodal (from 2016 onwards). The UNCTAD Liner Shipping Connectivity Index (2004-2018) is accessible at: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2240 (last accessed: 3 April 2019).

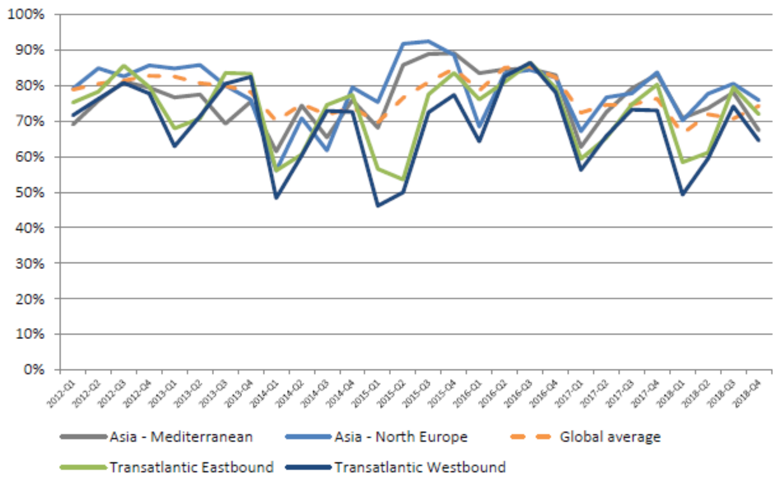
[116] ITF EU report, Figure 23.

[117] WSC submission of 14 March 2019, Table 1. These 4 services however represent only 1% of capacity on this trade. See Chart 6 above.

[118] ITF EU report, Figure 24.

Schedule reliability on European trades (defined as arrival of at least one day before or after schedule) was volatile through the period between 2014 and 2018 without presenting a discernible trend:

Chart 8: Schedule reliability on European trade lanes, 2012-2018[119]



Source: ITF based on Sea Intelligence

The available statistics on the cancellation of sailings ("blank sailings")[120] have remained stable between 2014 and 2018 both with respect to the number sailings that were cancelled (85) and the capacity affected (942,000 TEUs in 2014, 1 million TEUs in 2018) they have in fact improved in a longer time perspective offered by the available information (130 cancellations affecting 1.1 million TEU in 2012).[121] Because the overall capacity on the Asia – Europe trades has increased, the share of cancelation has decreased.

Nevertheless, the views of the customers and their associations, which participated in the public consultation, are that the quality of liner shipping services has deteriorated in recent years. However, the available statistical data on customers' sentiment, which is based on a large sample of customers,[122] suggests overall stability in the quality of services over the most recent years. In more details, the available statistical information on customer satisfaction in Europe shows a mixed picture where on some parameters customers' satisfaction has improved while on others it has decreased. In both cases, the change, either positive or negative, in the levels of satisfaction is moderate. In addition,

[119] ITF EU report, Figure 25.

[120] Relating to the Asia –Europe trades (Asia- North Europe and Asia-Mediterranean).

[121] ITF EU Report, p. 35-37.

[122] The data is based on three customer satisfaction studies carried out by the European Shippers Council (ESC) and Drewry in 2017, 2018 and 2019 analysing the responses of several hundred customers, a much larger sample than the respondents to the consultation. The results of the 2017 and 2018 studies are presented in the ITF EU Report, p.27. The results of the 2019 study are accessible at https://safety4sea.com/shippers-not-satisfied-with-clarity-of-surcharges-and-transit-times-report-says/ (last accessed 27 May 2019).

and importantly, the alleged deterioration (if any) would not appear to be imputable to the Consortia BER, but rather to the emergence of the three big alliances, the two biggest of which do not enjoy the benefit of the Consortia BER.

Overall the available data suggest that the quality of services has not deteriorated but rather remained stable since 2014.

No substantial indication of changes in circumstances in the short-medium term would appear.

5.3.6. Conclusions on relevance

To conclude, cooperation in consortia remains prevalent. Arguments that the high concentration level in the industry harms customers remain unsubstantiated as competition in the industry seems to function well,[123] transferring a fair share of cost savings to customers in the form of lower prices and keeping the quality of services stable.[124]

In these circumstances the consortia BER remains relevant, facilitating types of cooperation that generate efficiency gains and benefit consumers.

5.4. Coherence

Under this criterion, it is assessed whether the Consortia BER is coherent with the general competition policy and, in particular, instruments (BERs or guidelines) providing general guidance on the application of Article 101 TFEU. It is also assessed whether the Consortia BER is coherent with other sector-specific rules or EU policies.

As described in more details in the Synopsis Report annex, the respondent carriers consider that the Consortia BER does not present inconsistencies with other instruments of EU competition law. They consider liner shipping merits an exceptional sector specific BER due to the special feature of the industry of heavily relying on cooperation.

Furthermore, the carriers argue that the Consortia BER is coherent with other EU policies. For example, vessel sharing agreements have environmental benefits through reduced consumption and lower vessel emissions, and they bring technological benefits

[123] It is noted that the purpose of the 30% ceiling set in the Consortia BER is to ensure that the market exerts sufficient competition pressure on the consortia so that a fair share of their efficiency gains are passed on to consumers. By comparison, the Specialisation Regulation and the Horizontal Guidelines set a 20% ceiling for joint production agreements; and a ceiling of 25% is set by the Guidelines for the assessment of horizontal mergers (OJ C 31, 5 February 2004, p.5). The ceiling set in the Consortia BER is not significantly higher than the ceilings set by these other instruments and under which horizontal competition concerns are assumed not to arise. Moreover, in the Consortia BER context, the ceiling is also mitigated by the additional requirement of the Consortia BER that members of a consortium set their prices independently, adding additional competitive constraint of internal price competition between them. Because the Evaluation found that competition in the liner shipping industry continues to function well, the 30% ceiling serves its purpose and is still relevant. No sufficient evidence was brought forward to suggest that a different threshold would be more appropriate.

[124] See also Brooks, Meersman, Sys, Voorde, Vanelslander; Technical Report "Regulation in the liner shipping industry: pathways to a balance of interests", June 2019, p. 24: "[letting the Consortia BER expire without replacement legislation] *would increase industry uncertainty so much that all parties would lose.*"

through newer, more efficient, more technically up-to-date modern ships and improved IT systems for container tracking to meet shipper demands.

Other stakeholders do not question the coherence of the Consortia BER with the general competition policy, other instruments related to Article 101 and other policies of the EU. However, they argue that the liner shipping industry should not enjoy special treatment under the EU competition rules and be subjected to the general regime since, in view of today's market conditions, the Consortia BER provides benefits only to the carriers.

The special features and terminology of the liner shipping sector which have necessitated the existence of a special BER for consortia are still present today. Furthermore, the Consortia BER does not present inconsistencies with other instruments of EU competition law.

Besides, there is coherence between Consortia BER and the broader policies and objectives of the EU. Firstly, by facilitating certain consortia, the Consortia BER contributes to reducing the environmental impact of maritime transport. Secondly, the objective of the Consortia BER and its actual contribution to the (global) competitiveness of the Union's shipping sector are aligned with the Commission priority on jobs, growth and investment.[125]

To conclude, the Consortia BER is coherent with other policies and instruments of the EU, including instruments providing general guidance on the application of Article 101 TFEU. Moreover, even if maintaining the Consortia BER as one of the latest BER in EU antitrust legislation may appear as an exception, in the very specific circumstances applying to the liner shipping industry (e.g. strong role of cooperation), the existence of the Consortia BER remains justified.

5.5. EU added value

Under this criterion it is assessed what the added value of the Consortia BER is, considering in particular the Commission's measures of providing general guidance on the application of Article 101 TFEU.

As described in more details in the Synopsis Report, the carriers consider that the Consortia BER provides very helpful sector-specific guidance that cannot be found in other instruments or the decisional practice of the Commission and the EU's case law. They also consider that the Consortia BER is an influential source of guidance to non-EU jurisdictions that facilitates coherent treatment of consortia across jurisdictions. Coherent treatment is of special importance to carriers because of the cross-border nature of their business.

Other stakeholders (in particular shippers, freight forwarders, ports) are of the opinion that the general guidance instruments on the application of EU competition law provide sufficient relevant help for the liner shipping industry.

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[125] More on Commission priorities for 2015-2019 is available at: https://ec.europa.eu/commission/priorities_en (last accessed on 21 June 2019).

It is preliminarily noted that the Enabling Council Regulation grants only the Commission, and not the Member States, the power to adopt a BER for consortia. Indeed, the appropriate level for guidance on the application of competition rules to the provision of international liner shipping services is the EU level rather than the level of the individual Member States. Liner shipping is an industry whose very nature is cross-border and with respect to deep-sea liner shipping[126] the relevant geographic markets are often regions encompassing several Member States.[127]

The question whether a sector-specific BER applying to consortia has added value considering the existing instruments providing general guidance on the application of competition rules has been already touched upon above with respect to legal certainty and efficiency (see Sections 5.1 and 5.3). The Consortia BER uses industry-specific terminology, refers to arrangements that are very specific to consortia (that differ significantly to other sectors), and therefore offers more precise guidance than other instruments providing general guidance on the application of competition rules.

By its very nature as a sector-specific instrument the Consortia BER provides higher legal certainty to consortia than would have been the case without it. Its application also saves to a certain extent resources dedicated to the assessment of compliance with competition rules (see Section 5.2).

It is therefore concluded that the Consortia BER provides EU added value.

126 Deep-sea liner shipping is the provision of liner shipping service on the oceans, to and from the EU. Shipping services inside the EU between the Member States are referred to as “cabotage”.

127 Deep sea liner shipping markets are often defined as routes between regions of the world (for example: Far East Asia, North America East Coast) and two distinct regions in the EU: Northern Europe and Mediterranean region. See for example. COMP/M.8594 COSCO/OOIL paras. 14-1 and the reference there.

6. CONCLUSIONS

Since the adoption of the first Consortia BER in 1995 the consistent view of the Commission has been that consortia, under certain conditions set in the Consortia BER, could be rendered compliant with Article 101(3) TFEU. The Consortia BER in its current form was adopted in 2009 and was prolonged in 2014. Since then the liner shipping industry has been going through a process of consolidation, increased concentration and technological change, expressed in particular in the increasingly growing size of vessels. The ports/terminal operators, customers and their associations that participated in the public consultation expressed concerns regarding the increasing bargaining power of the carriers and deteriorating levels of service. Their complaints however were materially directed towards the alliances that to a large extent do not appear to be covered by the Consortia BER.

The evidence basis of this evaluation is to a large extent made of input of stakeholders. In spite of the methodological limitations in this evaluation, the overall available evidence reveals that there was no deterioration in the parameters of competition. Indeed, in recent years both costs for carriers and prices for customers per TEU decreased by approximatly 30% and levels of services seem not to have deteriorated but rather remained stable since 2014. Consequently there is no reason to depart from the longstanding view that consortia are an efficient way for providing and improving liner shipping services that also benefits customers. A fair share of the benefits resulting from the efficiencies is passed on to transport users.

The Consortia BER remains relevant as its objective to facilitate consortia remains appropriate in view of the ensuing benefits for customers.

The Consortia BER is a sector-specific measure referring directly to the special arrangements of this type of cooperation. Consequently it provides clearer guidance and higher level of legal certainty to consortia than would have been the case in its absence. The Consortia BER thus facilitates the assessment of consortia's compliance with competition rules, and helps carriers to save resources.

Although sector-specific BERs are today exceptional measures, the reliance on cooperation that allows to rationalise services and lower costs is made more pressing in view of the global economic challenges facing the container shipping industry.

Therefore, at this stage, the market conditions of the liner shipping sector appear to necessitate the existence of a sector-specific BER. Considering the major developments in the liner shipping industry in recent years, the evaluation indicates at this stage that the Consortia BER is relevant and delivering on its objectives; it would do so in a coherent, effective and efficient manner, creating EU added value.

However, developments in the sector in the coming years should continue to be followed to monitor their effects on competition and on consumers.

ANNEX 1: SYNOPSIS REPORT OF THE STAKEHOLDER CONSULTATION

I. INTRODUCTION

Commission Regulation (EC) No 906/2009 on the application of Article 81(3)[1] of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies ('Consortia BER')[2] will expire on 25 April 2020. The Consortia BER sets the specific conditions under which, in accordance with the provisions of Article 101(3) TFEU, shipping companies ("carriers") can agree to provide services together ("consortia agreements") and be exempted from the application of Article 101(1) TFEU. The approaching expiry prompted the current evaluation, which is due to be finalized before the expiry date.

The purpose of the evaluation is to assess the application, impact and relevance of the Consortia BER in order to inform the decision on the policy options after its expiry. The Commission collected evidence and views from numerous stakeholders in order to assess whether the Consortia BER is effective, efficient, coherent with other competition policy measures, relevant, and creating EU added value.

II. STAKEHOLDER GROUPS COVERED BY THE CONSULTATION ACTIVITIES

The consultation was open to the general public as well as public authorities (including national parliaments) by means of the public consultation on the Roadmap and the public questionnaire. The responses to these two consultations came from both private entities (various stakeholders) as well as public authorities such as national competition authorities ("NCA's").[3]

The Commission identified the following main groups of stakeholders of the consultation:

- Carriers
- Shippers and freight forwarders (as the customers of liner shipping services);
- Port authorities and terminal operators.

This also includes the associations of the respective groups of stakeholders.

1 As of 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (OJ C 306, 17.12.2007, p. 1) renumbered the articles of the TEC. Article 81 TEC became Article 101 TFEU and remained, in substance, unchanged. According to Article 5(3) of the Treaty of Lisbon, references to Article 81 TEC in instruments or acts of EU law are to be understood as referring to Article 101 TFEU.

2 Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 256, 29.9.2009, p. 31–34.

3 The Commission did not receive contributions from national parliaments.

Furthermore, the Commission has also been in close contact with other international organisations such as the OECD-ITF (International Transport Forum). Additionally, the Commission collected views from industry analysts, academics, labour unions and law firms specialising in competition law and the maritime sector ("Other stakeholders").

III. CONSULTATION ACTIVITIES AND INFORMATION SOURCES

A. Feedback on Roadmap

The Roadmap of the Evaluation was published on Commissions' Consultation website[4] on 7 May 2018 after which a four-week consultation was open for public feedback until 4 June 2018.

The Commission received three responses to the Roadmap: a response from CLECAT,[5] a joint response by WSC,[6] ECSA,[7] and ICS[8] and a response from an anonymous source.[9] Two respondents commented that the consultation period for the public consultation should be longer or finish later than indicated in the Roadmap and run at least until end of 2018. The Commission took these comments into consideration by amending the schedule so that the public consultation ran until 20 December 2018. The third response contained a written submission on reasons why the Consortia BER should be prolonged.

B. Public consultation

From 27 September to 20 December 2018, the Commission ran an online Public Consultation on Commissions' website for legislative initiatives as well as on the designated website of DG COMP. The launch of the consultation was accompanied with a press release.[10] In addition, informative emails were sent to several associations of carriers, shippers, and port operators, which had previously contacted the Commission and expressed interest in the evaluation, inviting them and their members to partake in the consultation.

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4 Link to the website: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2422025_en (last accessed 3 December 2018).

5 European Association for Forwarding, Transport, Logistics and Customs Services.

6 World Shipping Council.

7 European Community Shipowners' Associations.

8 International Chamber of Shipping.

9 The responses are publicly available on this link: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2422025/feedback_en?p_id=229482 (last accessed 16 January 2019).

10 Link to the press release: http://europa.eu/rapid/press-release_IP-18-5921_en.htm (last accessed 3 December 2018).

The consultation was published in three languages (English, German and French), while replies would have been accepted in all official language of the EU. The respondents could answer the consultation online or by sending it per email; in both cases they could submit additional supporting documents. The questionnaire comprised 28 questions, which were both closed-type questions (such as multiple-choice questions), inviting stakeholders to quantify the parameters, as well as open-ended-type questions, inviting stakeholders to express their views and identify concrete issues.

The objectives of the questions corresponded to the five assessment criteria (see section I).

The Commission received 32 responses to the public consultation, of which 5 were from carriers, 10 from their customers (6 from shippers, 2 from logistics companies, 1 from a freight-forwarding company), 4 from port authorities or port service providers and 13 who self-categorized themselves as none of the above.

C. Targeted consultation

In October 2018 the Commission sent targeted questionnaires to several stakeholders.

The consultation consisted of three separate questionnaires according to the main groups of stakeholders: Targeted Questionnaire for carriers, Targeted Questionnaire for customers (shippers and freight-forwarders), and Targeted Questionnaire for port operators.

In order to assure a broad outreach and representative sample of the stakeholders concerned, the Commission turned to their respective associations: ESC,[11] ECSA, ICS, CLECAT, ESPO[12] and FEPORT[13] and FTA.[14] With protection of personal data in mind, the Commission asked the associations to distribute to all their members an open call to express their interest in participating in the targeted consultation by sending the Commission an email; the Commission would in turn send them the relevant targeted questionnaire.

The Commission sent 71 questionnaires in total (61 to shippers and freight-forwarders and their associations, 6 to carriers and their associations, and 4 to ports and their associations). The Commission received 14 responses from shippers, 3 from ports and 4 from carriers.

D. Other consultation activities

11 European Shippers' Council.

12 European Sea Ports Organisation.

13 The Federation of European Private Port Companies and Terminals.

14 Freight Transport Association.

In October 2018, the Commission informed all NCA's through the European Competition Network about the ongoing evaluation and invited them to take part in the public consultation as well as to submit any observations. Two NCAs (Greece and Norway) responded to this invitation and contributed to the consultation.

Additionally, in the period between March 2018 and January 2019 the Commission has received several ad hoc additional position papers and submissions, sent outside the framework of the activities (consultations),[15] mostly on those stakeholders' own initiative. The Commission received 7 of such submissions.

The Commission granted all stakeholders' requests for a bilateral meeting or call.

The Commission also participated in a number of forums and conferences to inform participants on the ongoing evaluation and encouraged the participants to take part in it.[16]

IV. THE RESULTS OF THE CONSULTATION ACTIVITIES

This chapter summarizes the views and evidence collected in all of the activities of the consultation. The views of the carriers, vessel owners and their associations were generally aligned and are presented below together. Those of the other market participants having contributed the public consultation are presented separately, as relevant.

A. Effectiveness

The question on effectiveness focused on whether, considering the major developments in the industry, the Consortia BER still facilitates economically efficient cooperation that also benefits consumers.

Views of the carriers, vessel owners and their associations

The carriers, vessel owners and their associations explain that they are typically parties to several, sometimes many, consortia agreements on a large number of trades; the agreements are frequently replaced or amended in reaction to changing market conditions. For instance, the majority of carriers who responded to the targeted questionnaire concluded a new consortium agreement or amended an existing less than a year beforehand.[17] According to the carriers, vessel owners and their associations, in-house lawyers as well as the business and operations officers

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[15] Submissions outside the framework of the activities (consultations) are ad hod "unsolicited" contributions which did not answer questions asked in the consultations, but adressed the topic in an open format and style.

[16] Conferences organized by European Commission's DG EMPL on 7 November 2018 and 15 March 2019, by DG MOVE, on 14 December 2018, and ESPO on 11 December 2018 all in Brussels; Conference organized by the OECD's International Transport Forum (ITF), Paris, 8 February 2019.

[17] Responses to question 6 of the targeted questionnaires to carriers.

find the Consortia BER easily understandable and quite straightforward to implement. They consider that it generally provides them with a high degree of legal certainty. Indeed, the carriers who responded to the public questionnaires generally rated as "very high" or "high" the level of legal certainty the Consortia BER provides with respect to various matters,[18] although some considered the concept of highly integrated consortia[19] as less clear.

They are also of the view that the Consortia BER facilitates the creation and operation of consortia because other instruments providing general guidance on the application of Article 101 TFEU[20] are not specific to consortia and are therefore not as easy to apply and do not provide the same level of legal certainty. The majority of carriers who responded to the public questionnaire generally estimate that they rely on such other instruments to an intermediate or low degree. The Commission decisional practice however is relied on to a "very high" or "high degree".[21]

Other stakeholders

The prevalent view among the customers and their associations having expressed an opinion is that the Consortia BER does not provide legal certainty.[22] Their responses can be divided into two groups.

The first group of respondents - composed of four customer associations - express the view that the Consortia BER provides customers with little or no legal certainty with respect to the legality of the carriers' actions because carriers do not publish their self-assessment of compliance with the Consortia BER.

A second group of respondents is composed of five customer associations. The view of this group of responses, in essence, is that the Consortia BER cannot provide legal certainty anymore to carriers after the industry has undergone a significant process of horizontal and vertical integration. Specific issues are, with respect to horizontal cooperation, the creation of the three mega-alliances, and with respect to vertical integration, the exchange of information between carriers in relation to services provided outside of the ocean voyage. In addition, one port authority and an association representing ports express similar views.

[18] Market definition, market share calculation, exchange of information, capacity adjustments in response to fluctuations in supply and demand, overall compliance with competition law; Question 11.a) of the public questionnaire.

[19] Article 6, second paragraph of the Consortia BER.

[20] Such as the Horizontal Guidelines, the Article 101(3) TFEU Guidelines, the Specialisation BER and the Commission's decisional practice.

[21] Question 12 of the public questionnaire.

[22] Responses to question 10 of the public questionnaire.

A group of vessels owners who charter their vessels to carriers explain in its joint submission that the Consortia BER is not clear on cooperation between carriers with respect of chartering vessels and therefore does not provide legal certainty with respect to that issue.

B. Efficiency

The Commission has used this criterion to assess what the effect of the Consortia BER is on costs. Precisely, the Commission has tried to get answers on whether the Consortia BER helps undertakings to reduce costs or conversely whether it increases compliance costs for carriers.

Views of the carriers, vessel owners and their associations

The carriers, vessel owners and their associations reply that usually if a vessel sharing agreement falls within the Consortia BER the self-assessment can be conducted relatively easily and quickly. Moreover, an assessment under the Consortia BER is generally done internally, i.e. within the company, limiting cost. If the Consortia BER expired, the compliance costs would increase significantly due to higher complexity and the likely need to employ external consultancy, at least in some circumstances. However, this cost increase is difficult to be assessed precisely. This is because the compliance assessment is done generally in parallel to other tasks by the relevant companies' departments and usually it does not require employing additional staff. As to the cost of external consultancy for compliance assessment, it is also difficult to be estimated precisely as it depends on the complexity of arrangement. Nonetheless, it is perceived that removing the Consortia BER would lead to a disproportionately costly competition law assessment.

There is also a common view that the increased compliance costs due to the expiry of the Consortia BER, would be particularly difficult to cope with by small carriers. They usually operate only on a few routes and thus do not have large legal departments. In addition, they have more limited financial resources to hire external competition consultants. Thus, the costs of undertaking a self-assessment are likely to be disproportionately burdensome for smaller companies, which may deter them from participating in consortia.

Apart from direct financial costs, the carriers refer also to indirect costs that would appear if the Consortia BER expired, in particular in relation to the time necessary to conduct a self-assessment. The relatively short time of self-assessment under the Consortia BER allows the carriers to respond more quickly to market changes, and also to new opportunities. Without the Consortia BER, the carriers would be less agile to the changing environment. In addition, they would develop less consortia that as such allow them to operate more efficiently.

Other stakeholders

Some respondents coming from the different groups of stakeholders agree that the increased legal uncertainty, due to expiry of the Consortia BER would have to be compensated by additional legal costs to be borne by carriers. However, these respondents underline that the Consortia BER has indirectly resulted, in the recent years, in additional costs for: (i) shippers, who have had to build higher stock levels at their manufacturing sites or warehouses, caused by the increase congestion and service concentration; (ii) ports, which have had to, because of ULCVs, make investments into infrastructure (berthing capacity, terminal storage, hinterland access capacity (roads and rail) and nautical capacity, which many cannot recuperate under current market conditions.

C. Relevance

Under this criterion, the Commission asked whether the Consortia BER is still relevant, considering the major developments in the industry and the modes of cooperation between carriers.

1. Major developments in the industry

Views of the carriers, vessel owners and their associations

The main development in the liner shipping industry since 2010 noted by the carriers, vessel owners and their association has been the progressive consolidation in the sector. The industry has seen several significant mergers,[23] exits,[24] the reshuffle of the consortia landscape and the creation of the three major alliances (2M, Ocean Alliance, THE Alliance).[25] The market shares of 2M and the Ocean Alliance on the trade between Far East Asia and Europe are above the 30% ceiling for the application of the Consortia BER. However, according to the carriers, vessel owners and their associations, the industry remains rather fragmented with the top-5 carriers accounting for less than 65% of world's fleet capacity and the industry's overall HHI levels remaining below 1000 suggesting low level of concentration.

The trend towards ultra large container vessels (ULCV) has continued and the industry suffers from structural excess of capacity. Ocean freight rates decreased by

[23] In 2014 Hapag-Lloyd and CSAV; In 2015 COSCO and CSCL; In 2016 CMA CGM and NOL; In 2017 Hapag-Lloyd and UASC, Maersk and HSDG, the creation of the joint venture ONE by NYK, K-Line and MOL; In 2018 COSCO and OOIL.

[24] MISC withdraw from the industry in 2010; Hanjin went bankrupt in 2017.

[25] The term "alliances" refers to large consortia that operate on global scale (Asia – Europe, transpacific and transatlantic). The members of the 2M alliance are Maersk and MSC; HMM and ZIM cooperate with 2M. The members of THE alliance are Hapag Lloyd, Yang Ming and the ONE joint venture whose members are NYK, K-Line and MOL. The members of the Ocean alliance are CMA CGM, COSCO and Evergreen.

30% since 2013; consequently, profitability levels of the industry are low. Nevertheless, the choice and level of services has not decreased or even improved.[26]

Other stakeholders

Respondents coming from the different groups of stakeholders having expressed opinion on the matter of relevance generally considered that the developments in the sector in recent years, namely the process of horizontal and vertical integration of carriers and their impact on competition and services have changed significantly the conditions in the sector compared to the time when the Consortia BER was adopted, rendering the latter irrelevant.

Specifically, the 30% ceiling and the rules on joint purchasing in the Consortia BER are considered outdated and the general view expressed is that these rules should be made stricter. Consequently, respondents mainly call either for the non-prolongation of the Consortia BER or suggest that an amended Consortia BER is adopted, limiting the scope of the exemptions and enhancing the Commission's oversight over consortia and the benefits they bring to consumers. Few favour replacing or supporting the Consortia BER with more detailed guidelines on consortia. It is however widely acknowledged by the customer, port and terminal associations that consortia will remain important to the liner shipping industry in the future.[27]

2. Efficiency gains and benefits for consumers

Views of the carriers, vessel owners and their associations

The carriers, vessel owners and their associations explain that consortia allow carriers to achieve economies of scale, rationalise and improve their services. Consortia allow several carriers to consolidate cargo into fewer vessels and decrease the cost per container. It also allows rationalising services by decreasing the number of ports vessels are required to call at before they are profitably loaded. In this way, carriers can cut the journey shorter making it faster, cheaper and more reliable. Carriers cooperating in consortia agreements can offer new services on more routes or alternatively offer more frequencies on the same routes. Cooperation in consortia agreements may allow carriers to invest in modernising their fleets switching to more efficient (and usually larger) vessels. Cooperation in consortia is also lowering

[26] Responses to question 20 of the public questionnaire.

[27] See response of ESC to the public questionnaire, question 26; response of CLECAT to the public questionnaire, question 23; response of the Belgian Shipper Council to the public questionnaire, question 26; response of Anonymous, association, logistics companies, United Kingdom to the public questionnaire, question 26; response of Anonymous, association, freight-forwarding companies, Portugal to the public questionnaire, question 26; response of the Global Shippers Forum, to the public questionnaire, question 26; response of FEPORT to the public consultation, page 2, response of ESPO to the public questionnaire, annex, point 1.

entry barriers by allowing carriers to provide services that they would not have been able to offer alone.[28]

The carriers, vessel owners and their associations submit that customers enjoy the efficiencies generated by consortia. Customers enjoy lower prices, more choice in terms of the number of carriers that are able to offer services, more choice in terms of the number of services (routes, ports of call), and their quality (frequencies, reliability).[29]

In addition, the carriers, vessel owners and their association are of the view that customers enjoy the benefits of strong internal competition between the members of the same consortium; indeed members of consortia do not cooperate in the sale of the consortia services. They compete between each other on prices and on elements of service such as the quality of customer services; tailored transportation solutions; inland transportation; warehousing; documentation; digitalisation; tracking services; customs services; choice, quality and availability of containers they can offer customers; space availability guarantee; credit terms.[30]

Other stakeholders

The customers and their associations direct generally their responses to the three major alliances. As described above, they express concerns about deterioration in the level of choice and quality of services. Their overall view is that they do not benefit from the efficiencies achieved by the major alliances and consider that on balance they are worse off with the development of the major alliances.[31]

The customers and their organisations have mixed views with respect to price competition between consortia and between members of the same consortia; overall the responses seem to suggest that there is a degree of price competition in both cases.[32] The customers and their organisation are more sceptical with respect to competition on service levels. Even those who consider that there is some competition on service, noting similar elements to those mentioned above from the carriers' responses, are of the opinion that such competition is limited.[33] Overall, the

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28 Response to question 11 of the targeted questionnaire to carriers.

29 Response to question 17 of the targeted questionnaire to carriers.

30 Responses to question 15 of the public questionnaire and question 11 of the targeted questionnaire to carriers.

31 Response to question 7.2 of the targeted questionnaire to customers.

32 Responses to questions 8 and 11 of the targeted questionnaire to customers; responses to question 15 of the public questionnaire.

33 Responses to questions 9, 10 and 12 of the targeted questionnaire to customers; responses to question 15 of the public questionnaire.

customers and their association consider that in the past 5 years the level of prices has remained stable while the choice of services and their quality have deteriorated.[34]

3. Conclusions

Views of the carriers, vessel owners and their associations

The carriers, vessel owners and their associations consider that the Consortia BER is still very relevant. As mentioned above, they consider that despite the developments in the industry, consortia agreements covered by the Consortia BER remain the main stay of the industry. They estimate that in addition to the three major alliances, at least 61 consortia agreements apply to EU routes and consider that there is no alternative to cooperation in consortia. They note that even with respect to the three major alliances, the Consortia BER is still relevant with respect to the trades where their market shares are below 30%. In response to the question about types of cooperation that fall outside of the Consortia BER, it is mentioned that 2M and Ocean Alliance are not covered by the Consortia BER to the extent that their market shares exceed the 30% ceiling. They noted in addition slot agreements with other carriers.[35] There exist also cooperating in associations dealing with the digitalisation of the industry.[36] The carriers, vessel owners and their associations do not identify possible developments in the types of cooperation in the industry in the near future[37] and consider that there is no alternative to cooperation in consortia.

Carriers, vessel owners and their associations explain that the liner shipping sector has unique features justify a sector-specific BER, including:

- it is a capital intensive industry;
- demand for service is seasonal, cyclical with changes in trading patterns and variations in the global economy (leading to proneness to overcapacity);
- cargo volumes of trade are always unbalanced;
- ships sail whether they are empty or full, the products have no storability;
- it has cross-border reach, and a single trade string calls ports in multiple jurisdictions with different laws;

[34] Responses to question 15 of the public questionnaire.

[35] With slot agreements, carriers buy or exchange capacity on existing services of other carriers and do not rationalise or improve the service. They therefore are not covered by Article 2(1) of the Consortia BER; see paragraph 40 of the Commission's technical paper of October 2008 on the Regulation 823/2000 (the previous Consortia BER).

[36] Responses to questions 21-22 of the public questionnaire and question 21-23 of the targeted questionnaire to carriers.

[37] Response to question 23 of the targeted questionnaire to carriers.

- state intervention into shipbuilding and liner shipping that artificially fuels global surplus capacity; and
- the time lag between ordering new vessels and their delivery and how market conditions can change in the period between.

The customers and their associations direct generally their responses to the three major alliances. As described above, they express concerns about deterioration in the level of choice and quality of services. Their overall view is that they do not benefit from the efficiencies achieved by the major alliances and consider that on balance they are worse off with the development of the major alliances.[38]

Other stakeholders

Respondents coming from the different groups of stakeholders having expressed opinion on the matter of relevance generally considered that the developments in the sector in recent years, namely the process of horizontal and vertical integration of carriers and their impact on competition and services (see Section IV.A on Effectiveness above) have changed significantly the conditions in the sector compared to the time when the Consortia BER was adopted, rendering the latter irrelevant.

Specifically, the 30% ceiling and the rules on joint purchasing in the Consortia BER are considered outdated and the general view expressed is that these rules should be made stricter. Consequently, respondents mainly call either for the non-prolongation of the Consortia BER or suggest that an amended Consortia BER is adopted, limiting the scope of the exemptions and enhancing the Commission’s oversight over consortia and the benefits they bring to consumers. Few favour replacing or supporting the Consortia BER with more detailed guidelines on consortia. It is however widely acknowledged by the customer, port and terminal associations that consortia will remain important to the liner shipping industry in the future.[39]

D. Coherence

Under this criterion, the Commission asked whether the Consortia BER is coherent with the general policy of harmonising competition rules and replacing sector-specific rules with measures (BERs or guidelines) providing general guidance on the application of Article 101 TFEU.

Views of the carriers, vessel owners and their associations

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[38] Response to question 7.2 of the targeted questionnaire to customers.

[39] See response of ESC to the public questionnaire, question 26; response of CLECAT to the public questionnaire, question 23; response of the Belgian Shipper Council to the public questionnaire, question 26; response of Anonymous, association, logistics companies, United Kingdom to the public questionnaire, question 26; response of Anonymous, association, freight-forwarding companies, Portugal to the public questionnaire, question 26; response of the Global Shippers Forum, to the public questionnaire, question 26; response of FEPORT to the public consultation, page 2, response of ESPO to the public questionnaire, annex, point 1.

From the carriers' point of view, none of other existing instruments (e.g. Horizontal Guidelines, Specialisation BER) offer, to container shipping, self-assessment guidelines and legal certainty equivalent to the Consortia BER.

Carriers, vessel owners and their associations consider that the Consortia BER is not vitiated by any internal inconsistencies that would compromise the attainment of its objectives. Moreover, in their views the Consortia BER is coherent with the EU competition policy, with EU maritime policies, and EU environmental policies.

According to carriers, vessel owners and their associations, the Commission overstates its general policy of harmonisation of competition law in the form of removing sector-specific competition regulations. Sector-specific legislation and guidelines exist, among others, for motor vehicle distribution, certain road and inland waterways undertakings, or agricultural products.

They also note that the general policy of harmonisation competition rules is only justified for removing sector-specific block exemptions if there were already equivalent Commission guidance in place to self-assess the specific form of cooperation in a sector in question. This is not a case for the liner shipping sector. Removing the Consortia BER would lead to disproportionately costly competition law assessment. This increased cost would be particularly difficult to cope with by smaller carriers (including regional or feeder carriers).

Other stakeholders

Other stakeholders note that while the Consortia BER was a good instrument when it was introduced, its existence is no longer justified – in particular, because its original goals have been already accomplished. Moreover, the Consortia BER creates now benefits almost entirely to the shipping lines and works to the detriment of other shareholders of the logistic chain. A minority of stakeholders also expressed the opinion that the liner shipping sector should the subject to the same rules as other sectors since there is no reason to conclude otherwise.

E. EU added value

With this criterion the Commission has sought answers to the question whether the Consortia BER offers guidance on essential matters not covered by other instruments providing general guidance on the application of Article 101 TFEU. In particular, the Commission has tried to check whether the Consortia BER has 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.

Views of the carriers, vessel owners and their associations

The carriers, vessel owners and their associations consider that the Consortia BER provides a clear legal environment in which it is easy for liner companies to set up consortia. The expiry of the Consortia BER would place the liner shipping sector in a situation of considerable legal uncertainty because, in contrast to other sector without BERs, the guidance from Commission practice and decisions, publications of the

Commission and decisions taken by courts of Member States for the liner shipping sector is at best very limited. By contrast, the Consortia BER is a sector-specific instrument that reflects well the characteristics of the liner shipping sector, which differs significantly from other sectors. Therefore, it constitutes an important added value for the compatibility assessment, particularly if compared to the self-assessment based on other instruments for the compatibility assessment under Article 101 TFEU. Neither the Horizontal Guidelines nor the Specialisation BER, nor the Article 101(3) Guidelines provide equivalent degree of guidance, protection or legal certainty as the Consortia BER.

In addition, in their view the Consortia BER also ensures a regulatory level playing field between the EU and other major jurisdictions in which the Consortia BER is well understood and serves as a useful reference point. Most of these jurisdictions have regulatory systems in place to guarantee that certain consortia would not be the subject to ex-post antitrust scrutiny. If the Commission decided not to provide legal certainty on consortia, carriers whose operations are focused on the European trades would be in a competitive disadvantage. Moreover, several respondents argue that the Consortia BER is a benchmark used by other non-EU jurisdictions that follow the Commission's method in providing this safe harbour to the liner shipping. There is a fear that if the Commission decided not to renew the Consortia BER, other jurisdictions may over time follow suit, and thus the compatibility costs for other jurisdictions would also increase.[40]

Other stakeholders

Stakeholders (shippers, freight forwarders, ports) note that consortia-like agreements could be formed and operate successfully without a block exemption regulation, on the basis of general guidance as done in other sectors, most notably in the airline sector.

V. CONCLUSION

The responses to the consultation have provided a wide spectrum of views and addressed all of the five assessment criteria. Overall, there is a noticeable polarization of the replies between the groups of stakeholders. Carriers are predominantly supportive of the Consortia BER, see it as beneficial and argue for its prolongation. On the other hand, the majority of shippers and port/terminal operators are critical towards the Consortia BER and are warning about its negative effects and advocating for a change to the status quo (either non-prolongation or modification).

[40] Responses to question 23 of the public questionnaire.