CLECAT european voice of freight logistics and customs services •

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BRIEFING PAPER

Review of Regulation 906/2009 - Commission invites comments on future regime for liner shipping consortia

Purpose: CLECAT has been invited to give comments to the review of the legal framework exempting liner shipping consortia from EU antitrust rules that prohibit anticompetitive agreements between companies, known as the "Consortia Block Exemption Regulation".

This paper provides some background on the review process to explain members why freight forwarders should take an interest in the review.

On the **26th September** the Commission launched a consultation seeking to collect views from stakeholders to assist the Commission's assessment of the impact and relevance of the Consortia Block Exemption Regulation, and to provide evidence for determining whether it should be left to expire or prolonged, and if so, under which conditions. The consultation is open, through the consultation website until 20 December 2018. After this the Commission will review all input and will publish the stakeholders' submissions, a summary of the main findings and conclusions on the consultation website.

- **Targeted questionnaire:** DG Competition would like to receive input and feedback from companies that are interested in receiving the targeted questionnaire. You will need to express your interest of participation by sending an email to DG COMP's functional mail box COMP-CONSORTIA-EVALUATION-2018@ec.europa.eu. **On the website the Commission has noted that the deadline for the expression of interest is Friday, 12 October 2018.** Those who will email us with the above-mentioned request for a *targeted questionnaire* after the deadline of 12 October 2018 will nonetheless also receive one. However, the deadline for responses, i.e. 20 December 2018, will remain unchanged.
- **Public questionnaire:** In addition, DG Competition has launched – **for a period of 12 weeks –** a public consultation to evaluate the Consortia Block Exemption Regulation. The public questionnaire to respond to is available online here. DG COMP expects the answers to the questionnaire by Thursday, 20 December 2018 at the very latest.

  Please note that for the public consultation you need a EU transparency registry number. However, stakeholders can request, receive and respond to the *targeted questionnaire* without having a transparency registry number.

What is a consortium?

- A consortium is an operational co-operation between two or more liner shipping carriers with a view to providing a joint service on a trade. Such cooperation cannot cover pricing or output restrictions.

What is an EU block exemption?

- A block exemption Regulation (BER) defines types of agreements which are compatible with EU competition rules provided that the agreements meet the conditions laid down in the

Regulation. In the absence of a block exemption, companies must assess for themselves whether their agreements are compatible with the EC Treaty's ban on restrictive business practices. A block exemption Regulation needs to be assessed at regular intervals, in order to determine whether the conditions which originally justified it, continue to exist. *The Commission has granted a block exemption from the competition rules for consortia since 1995 and has renewed the exemption three times since then.*

- In view of the *expiry of the current block exemption Regulation on 25th April 2020*, the revision process has the objective to assess whether conditions of Article 81 (3) of the EC Treaty, allowing to derogate from the EC Treaty's general ban on agreements between undertakings can still be satisfied where such agreements foster productivity and innovation, provided that they pass on a fair share of the benefit to consumers, are proportionate and do not eliminate competition on the market. ''Benefits' can mean: better coverage of ports (improvement in the frequency of sailings and port calls) and better services (an improvement in scheduling, better or personalised services through the use of more modern vessels, equipment and port facilities).

What were the main changes proposed in the previous review?

- Following the review of the BER in 2005 some changes were made in the BER including:
  - a clarification of the definition of a consortium
  - a revision of the activities exempted by the Regulation
  - a decrease of the market share threshold from 35% to 30% and clarifications on how to calculate this market share threshold.

What were the previous steps and what are the Next Steps of the review?

- The Commission issued a **Roadmap** to which parties where invited to comment (see CLECAT Comments)

- In the years since the introduction of the first Consortia BER, the Commission has progressively repealed all maritime-specific competition legislation and guidelines as part of 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. **Today the Consortia BER is the only remaining maritime-specific competition measure.** Furthermore, in recent years, given the challenging economic context, the liner shipping industry has been undergoing a significant process of consolidation.

- *Allowing the Consortia BER to expire would not mean that consortia agreements become unlawful. It would only mean that they will be examined under the general rules on competition just as cooperation agreements are examined in other sectors.*

Evaluation criteria

The objective of the consultations is to obtain information on the following evaluation criteria and questions:

- **Effectiveness:** Does the Consortia BER provide legal certainty for economically efficient type of cooperation that also benefits consumers?

- **Efficiency:** what is the effect of the Consortia BER on costs and to what extent? Does it help undertakings to cut costs or conversely does it increase compliance costs? Is it causing more or less burden or complexity than other policy options?
- **Relevance**: is the Consortia BER still relevant considering the major developments in the industry and the modes of cooperation between carriers? Is the Consortia BER relevant compared to other instruments that provide guidance on the interpretation of Article 101 TFEU to cooperation agreements (for example: the Horizontal Guidelines, Article 101(3) Guidelines, the Specialisation BER and EC decisional practice)?
- **Coherence:** Is the Consortia BER coherent with other instruments that provide guidance on the interpretation of Article 101 TFEU (for example: the Horizontal Guidelines, Article 101(3) Guidelines, the Specialisation BER and EC decisional practice)?
- **EU added value**: Does the Consortia BER have added value in the assessment of the compatibility of consortia with Article 101 TFEU compared to, in its absence, self-assessment based on other instruments that provide guidance on the interpretation of Article 101 TFEU?

Exempted agreements

Below you will find an extract of the article 3 on the exemption the carriers have and CLECAT's early comments highlighted:

Pursuant to Article 81(3) of the Treaty and subject to the conditions laid down in this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to the following activities of a consortium: Pursuant to Article 81(3) of the Treaty and subject to the conditions laid down in this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to the following activities of a consortium:

(a)the joint operation of liner shipping services including any of the following activities:
the coordination and/or joint fixing of sailing timetables and the determination of ports of call;
(b) the exchange, sale or cross-chartering of space or slots on vessels;
(c) the pooling of vessels and/or port installations;
(d) the use of one or more joint operations offices;
(e) the provision of containers, chassis and other equipment and/or the rental, leasing or purchase contracts for such equipment;

The use of slot sharing and high volume consolidation – both direct effects of shipping alliances – can negatively impact visibility into the logistics chain. This is case because cargo is loaded on either vessels of alliance members or on feeder vessels that do not belong to the same company. In the case of cancelled sailings or rollovers of containers, both freight forwarders and shippers have experienced low quality of information flows, which complicates the activities of freight forwarders.

2. capacity adjustments in response to fluctuations in supply and demand;

Capacity adjustment should be limited exclusively on shipping capacity and not on the inland operations. Freight forwarders have been mainly impacted by decreasing schedule reliability and service quality owing to rationalisation strategies of carriers and alliances.

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3. the joint operation or use of port terminals and related services (such as lighterage or stevedoring services);

The current practice is that alliances seek to have negotiations with the terminals as the alliance, not as individual carriers. This will lead to less offer, lack of transparency and less competition.

4. any other activity ancillary to those referred to in points 1, 2 and 3 which is necessary for their implementation, such as:
(a) the use of a computerised data exchange system;
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(b) an obligation on members of a consortium to use in the relevant market or markets vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties;
(c) an obligation on members of a consortium not to assign or charter space to other vessel-operating carriers in the relevant market or markets except with the prior consent of the other members of the consortium.

The notion of the relevant market is obsolete. The three global alliances (2M, Ocean and THE Alliance) in which all major carriers are represented since early 2017 now account for around 80% of overall container trade and operate around 95% of the total ship capacity on East-West trade lanes, therefore giving them a powerful position on the market.

Consolidation and cooperation among container lines have also affected availability of equipment and vessel slots. The availability of containers appears to be a concern for various forwarders and shippers.

Vertical integration of carriers in forwarding could potentially threaten business models of intermediaries that are partly based on providing value-added financial products to customers.