

POSITION PAPER

BLOCK EXEMPTION REGULATION

March 2019

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The European Shippers' Council represents the interests of more than 75.000 cargo owners in the European Union, both SMEs and large multinational companies. For all of them, transport is an indispensable link to their customers. Efficient and sustainable transport & logistics are therefore critical for the competitiveness of the European industry and the socio-economic welfare in Europe.

ABSTRACT - KEY CONCEPTS OUTLINE

- *None of the consortia are fully compliant with the current BER-criteria.*
- *Consortia market shares and relevant markets should be more clearly defined and monitored.*
- *Consortia and / or Alliance market power should bring responsibility and accountability.*
- *A mechanism for transparent compliance procedures through regular reporting and independent monitoring of market disruptions, should be put in place. This could be achieved without neither modifying DG Comp's mission nor draining its resources.*
- *If the requirements of shippers are not met, the entire BER should be revoked.*

1. BACKGROUND

The Consortia BER has, since it was first adopted in 1995, established the relationship between carriers and their customers on the need to achieve maximal productivity and service improvements. It has a major effect on the market and the relationship between suppliers & users as set out below.

▪ Market

Regulation 246/2009 makes it clear that a fair share of the benefits and efficiencies generated by the BER should be passed onto shippers¹. It sets out criteria that need to be met:

- Improvement in productivity benefitting the users of the shipping services.
- Improvement in frequency of sailings, port calls, scheduling and better quality of services.
- Other criteria which may be proof of benefits for users.

As demonstrated by the shippers' previous fillings, the attached complementary information (as an addendum to this document), and as supported by various official reports² as well as other stakeholders' data, the conclusion of last years market operations assessments is that the above criteria have generally not been met.

During the past years, the market situation has - and is still – suffering from low service levels as evidenced by the publicly available statistics on blank sailings and the total lack of schedule reliability. Also, the experience of many customers concerning unacceptably poor communication and incident handling management by several carriers, reflects a regrettable tendency mode of current supplier-customer relationship patterns.

Shippers have been experiencing – and still do – a new configuration of freight costs, where surcharges³ have been frequently used as an instrument to cover additional costs or get around agreed contractual conditions. If sea freight rates have been reduced in average, this is mainly due to the massive injection of very large box ships into the fleets, which may have taken place anyway, even if no major alliance had been set.

¹ Council Regulation 246/2009, Recital 10 : *In order to ensure that all the conditions of Article 81(3) of the Treaty are met, conditions should be attached to group exemptions to ensure in particular that a fair share of the benefits will be passed on to shippers and that competition is not eliminated.*

² OCDE/ITF. The Impact of Alliances on Container Shipping. 2nd Nov. 2018

³ Maersk. Surcharge list & definition <https://www.maersk.com/en/solutions/shipping/glossaries/surcharge-definition>
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The benefits, upon which the BER is conditional, have not been delivered by the consortia to the transport users. As a conclusion, we can say that the market is not performing properly due to the following points, considered to be a direct consequence of the BER:

- Very high concentration between competitor carriers on the two main trades to/from Europe.
- The resulting service uniformity.
- Uncertainty that requires further clarification: very few consortia are located within the scope of 30% threshold.

The purpose of the BER - providing legal advantages to certain categories of consortia in order for them to achieve a level of integration of operations which would in turn allow them to be more efficient and share the resulting efficiency gains with their customers - is therefore put in question by the operational background of the 3 major alliances.

Although clear underperformance has been evidenced, it cannot be fully quantified nor properly remedied because the objectives of the consortia, in terms of efficiency, have never been made public and are not transparent to other stakeholders, in particular, the carriers' customers, or the relevant competition authorities. The BER presently lacks an effective monitoring tool ensuring transparent compliance and allowing for an open verification of how the full benefits are actually passed onto the carriers' customers.

▪ Stakeholders' relationship

Despite some service level performance information available by the industry or by neutral third parties on punctuality, reliability and freight rates, this information is neither sufficient to allow shippers to challenge the performance of their carriers nor to provide them with a good forecast of future liners schedules based on their past execution accomplishments.

The absence of direct constructive communication between carriers and customers on the capacity, service level and performance of shipping companies also triggers a confusing/conflicting appreciation of the unsatisfactory situation root cause. Indeed, carriers invariably excuse their shortcomings by the impossibility to forecast demand and adapt to its fluctuations, and by a lack of shippers' interest for tailor made/non-commodity type of services. End customers perceive on their side a prevailing structural lack of resources in carriers' organizations which prevents them to differentiate themselves on the non-sea faring part of their service.

All in all, the absence of dialogue, evidenced by the lack of an asserting approach, is raising the frustrations and is negatively impacting on the economy on both sides.

On top of that, the present BER introduced an unbalanced legal treatment of alliances on the one hand, and alliance customers as well as the other stakeholders, on the other. For instance, the status of large alliances, as falling within or outside the scope of application of the BER and thus being exempted or not from the application of Article 101 (1) TFEU, remains unclear. This is not insignificant as the burden of proof of compliance or non-compliance to competition law shifts from one side to the other depending on such status.

This resulting opaque and distant stakeholders' relationship places shippers and other stakeholders in an uncertain situation to defend their interests. This conflictual and legally unbalanced situation should be ended.

▪ **Recommendation**

ESC has thus concluded, jointly with other Associations, that the European Commission should repeal the Consortia BER unless a revised regulatory framework clarifying the scope of application of the BER is adopted.

2. ADVOCACY

The specific measures advocated by ESC as an indispensable part of a reformed BER are described below:

2.1 EXEMPTION BASE DEFINITION.

The present BER criteria used to identify those consortia which are exempted are neither defined clearly enough, nor measurable. This may have accommodated the setting-up of large consortia. ESC acknowledges the importance of the benefits of the BER for smaller consortia but calls for the following points to be reviewed in order to clarify the status of larger consortia:

▪ **Market threshold**

A re-definition of the threshold to consider the market power should be introduced. It would trigger the obligation to abide to fulfilling efficiency targets and undergoing regular monitoring of performance, also by taking into consideration all the individual "relevant markets" percentage as the reference figure percentage level.

▪ **Market share measurement**

The market share should be calculated based on an assessment of the effects arising from the combined fleets of each consortium member as well as capacity of carriers/consortia per trade lane, and not on volumes, as the statistics on volumes are not readily available and market power is proportionate to capacity.

In addition, it is necessary to consider the market shares of consortia on all trade lanes assessed. Indeed, it is conceivable that the market share of a consortium may exceed the BER threshold on a given trade lane and at the same time, be below the threshold on another trade lane. This poses the question if a consortium may *credibly* claim the benefits of the BER on the trade lane where its market share is below the BER threshold; whilst operating outside the BER. Additionally, subject to Article 101 TFEU on the trade lane where its market share exceeds the BER threshold, it is also necessary to clarify the provision on exceeding the threshold longer than what the regulation mentions as *two consecutive calendar years*.

Consortia members will have necessarily acquired significant knowledge of business sensitive information and practices of each other when operating on a given trade lane under the benefits of the BER and this fact makes it difficult to accept that they compete at arm's length against each other on the trade lane where the BER threshold requirement is not met. In such circumstances, it would strongly appear that the benefit of the BER should not be available to consortium members, also with regard to the trade lane where the consortium's market share satisfies the BER requirements.

- **Relevant markets**

The BER should provide more specific guidance on relevant service and geographic market definition, particularly significant for high traffic trade lanes.

2.2 INTRODUCTION OF OBLIGATIONS FOR CONSORTIA WITH A SIGNIFICANT MARKET POWER

The large alliances have a significantly greater impact on the market than the smaller VSAs. New provisions should be introduced in the BER to identify such highly powerful consortia, as proposed in Section 2.2.1 and specific measures should apply to such consortia, detailed in Section 2.2.2 below:

2.2.1 Market power considerations.

A large, but still eligible for exemption, market share of a consortium in a highly concentrated market should be the first criterion to define market power.

Influence of large consortia's members on the markets related to other operations of overseas maritime transport, such as "domestic" intra EU feeder services, ports terminal operations and inland transport, should also be considered when assessing the market power of consortia.

2.2.2 Obligations to be imposed on consortia with a significant market power

The EU rarely measures efficiency gains as a result of consortia or the fair sharing of such benefits between liners and their customers. ESC calls for specific performance and transparency commitments to be included in a revised BER for consortia enjoying a significant market power as follows:

▪ **Quality ratios**

Large consortia would have to adhere to obligations of reliable communication of targeted and achieved performance, resulting from their joint operations, quantified as Key Performance Indicators (“KPI’s”):

- KPIs’ should bear on punctuality, reliability and optimized freight operational costs.
- Sharing of such information should be enforced as an obligation of transparency to be assessed as well.

▪ **Regular reporting for compliance**

In order to allow the monitoring of KPI’s, consortia should be subject to annual reporting requirements allowing the European Commission to ascertain (1) the efficiency gains brought about by each large consortium operations; (2) the fair sharing of such efficiency gains with other parties; and (3) to increase regular data transparency on consortia, on coverage and relevance.

▪ **Monitoring trustee**

Alternatively, the European Commission would be discharged of most of the regulating workload by appointing a monitoring trustee for each large consortium, having the task to regularly report to the European Commission on the continued compliance of each consortium with the BER requirements; and if needed propose necessary changes in the operations of a consortium in order to meet the amended BER requirements.

3. CONCLUSIONS

ESC recommends to revoke the BER, and replace it with verifiable provisions and mechanisms ensuring the transfer of benefits arising from consortia operations to shippers and other stakeholders, as was the intention of the legislators when introducing the BER. If all these conditions are not met, ESC prefers the BER to be completely discontinued.