

## WSC / ECSA / ICS

## Consortia Block Exemption Regulation ("BER")

## European Commission Evaluation Roadmap

## HT.5252

These are comments of the World Shipping Council (WSC), the European Community Shipowners' Associations (ECSA), and the International Chamber of Shipping (ICS)<sup>1</sup> on the European Commission's Evaluation Roadmap for the review of the consortia block exemption regulation.

## 1. THE BETTER REGULATION GUIDELINES

The Commission's Better Regulation Guidelines establish the mandatory requirements and obligations that the Commission must follow whenever it embarks upon any legislative policy initiative, including the review of the consortia block exemption regulation<sup>2</sup>. Indeed, the Evaluation of the Consortia Block Exemption Regulation is listed on the Commission's Better Regulation initiatives website<sup>3</sup>.

This response is therefore structured around the six questions that the Commission must consider as part of any legislative evaluation: (1) what is the current situation; (2) how effective has the EU intervention been; (3) how efficient has the EU intervention been; (4) how relevant is the EU intervention; (5) how coherent is the EU intervention internally and with other (EU) actions; and (6) what is the EU added value of the intervention?<sup>4</sup>

This response focuses only on the factors the Commission should consider in conducting the BER review under the evaluation framework established by the Better Regulation Guidelines. It goes without saying that the WSC, ECSA, ICS and their liner shipping members will participate fully throughout the review process and assist the Commission in its information-gathering.

## 2. WHAT IS THE CURRENT SITUATION?

As the Better Regulation Guidelines note, "[a]n evaluation starts by finding out how the situation has evolved since the intervention began, how the intervention has been implemented and/or applied, what has happened/is happening to different stakeholders"<sup>5</sup>. The following issues will need to be examined in detail.

### 2.1 What is the rationale behind the Consortia BER?

The rationale of the Consortia BER, throughout its 20+ year history, has been to promote efficiency-enhancing operational cooperation between liner shipping companies by providing a clear, simple and flexible legal framework for the adoption and alteration of such arrangements with minimal compliance costs.

Liner shipping involves the provision of regular scheduled services (usually weekly) for the carriage of cargo by container.<sup>6</sup> To offer shipping on a certain route once a week, a minimum number of vessels is required, which is known as a string.<sup>7</sup> For example, on the

<sup>1</sup> EU Transparency Register numbers / WSC: 32416571968-71 / ECSA: 59004966537-01 / ICS: 90104608462-14

<sup>2</sup> Commission Staff Working Document - 'Better Regulation Guidelines' COM (2017) 350, p.3

<sup>3</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives\\_en?page=4](https://ec.europa.eu/info/law/better-regulation/initiatives_en?page=4)

<sup>4</sup> Commission Staff Working Document - 'Better Regulation Guidelines' COM (2017) 350, pp.58-59

<sup>5</sup> Commission Staff Working Document - 'Better Regulation Guidelines' COM (2017) 350, p.59

<sup>6</sup> Case M.8330 - *Maersk/HSDG*, recitals 11, 19

<sup>7</sup> Case M.8330 - *Maersk/HSDG*, recital 56

North Asia to Northern Europe trade, a string consists of between 10 and 12 vessels. Often, a service must deploy multiple strings to offer the multi-port services required by many shippers. The nature of liner shipping means that customers generally need consistent levels of capacity each week, subject to seasonal fluctuations. So, vessels on a given service must be as close in size to one another as possible, or the carrier will not be utilising each ship's full capacity. "Right-sizing" vessels within a string has become more difficult over the last decade because of the increasing size disparity in the global fleet.<sup>8</sup>

The high minimum viable scale on each trade means that carriers often cannot enter or sustain a service alone. Instead, companies can offer a joint service through a vessel sharing agreement ("VSA"). Under a VSA, 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. Within the joint service, the members have a strong incentive to offer their slots to individual customers at a competitive price because they are not compensated if their slots are not used. The members of the VSA jointly decide the sailing timetable, but there is no price coordination, joint marketing, revenue sharing or, with some limited exceptions, joint purchasing.<sup>9</sup> The Consortia BER exempts both single and multi-trade arrangements.<sup>10</sup>

VSAs promote competition by lowering barriers to entry on a given trade. This, in turn, ensures that customers have a wider range of carriers to choose from, increasing competition. They also enable smaller parcels of capacity to be added to a trade than would be required by a single carrier to operate a scheduled service and thereby enable capacity to be adjusted more accurately to demand. For these reasons, VSAs are particularly important for small and medium size shipping companies. By allowing these carriers to achieve economies of scale that would otherwise be impossible, VSAs overcome barriers to entry. The Consortia BER provides the legal underpinning for such arrangements in a cost-efficient way.

## 2.2 What is the history of the Consortia BER?

Since Commission Regulation (EC) No 870/95, adopted pursuant to Council Regulation (EEC) No 479/92, the Commission has consistently recognised the efficiencies created by consortia agreements and, subject to certain conditions, has block exempted them.

The current Consortia BER states that '*Consortia... generally help 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 also help to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity.*<sup>11</sup>

In 2009, the Commission amended the Consortia BER in light of the abolition of the liner conference block exemption. Amongst other things, the market share threshold for the Consortia block exemption was reduced from 35% to 30%. Following these changes, the Commission noted in its last review that '*Since the new legal framework has been in place and applied for only a short period of time, further changes should be avoided at this stage. This will avoid increasing the compliance costs of the operators in the industry.*<sup>12</sup>

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<sup>8</sup> World Shipping Council, *The Liner Industry Supports the Commission's Proposed Extension of Commission Regulation (EC) No 906/2000* (March 2014), p.7

<sup>9</sup> Case M.8330 - *Maersk/HSDG* recital 52

<sup>10</sup> Commission Regulation (EC) No 906/2009 of 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) ("Consortia BER"), Article 2(1)

<sup>11</sup> Consortia BER, recital 5

<sup>12</sup> Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application, recital 2

The Commission's last review, in 2014, also found that '*On the basis of the Commission's experience in applying the block exemption, it appears that the justifications for a block exemption for consortia are still valid and the conditions on the basis of which the scope and content of Regulation (EC) No 906/2009 were determined have not substantially changed.*'<sup>13</sup>

This remains true today, as explained below.

### 2.3 Changes in the liner shipping industry since the last review

As the Roadmap notes, the liner shipping industry has undergone a period of consolidation. Since the last review, COSCO and China Shipping Group (2015), CMA CGM and Neptune Orient (2016), Hapag-Lloyd and United Arab Shipping Co (2017), and Maersk and HSDG (2017) have all combined. NYK, K line, and MOL (2017) also created a JV, Ocean Network Express (ONE), which includes each of their respective liner shipping businesses.<sup>14</sup> COSCO are currently in the process of acquiring Orient Overseas International. These transactions (and the commitments required as a condition of EU merger clearance) had a significant impact on the membership of the major alliances and several smaller VSAs.

Nonetheless, the level of consolidation in liner shipping should not be overstated. As the Commission noted in *Maersk/HSDG*, the industry remains 'rather fragmented'. MSC, CMA CGM, COSCO, and Hapag-Lloyd individually have less than 15% of the world's total fleet capacity.<sup>15</sup> Even Maersk, the largest carrier, only has 19% of total capacity.<sup>16</sup> Combined, this 'top five' have less than 65% of the world's fleet capacity.<sup>17</sup>

## 3. HOW EFFECTIVE HAS THE CONSORTIA BER BEEN?

Effectiveness analysis considers how successful the block exemption has been in achieving or progressing towards its objectives, using appropriate points of comparison, including prior impact assessments.<sup>18</sup> An important comparison is the counterfactual that would have occurred if the block exemption had not been in place.<sup>19</sup> Unlike the relevance review, the effectiveness analysis is retrospective.<sup>20</sup>

However, the Commission's Evaluation Roadmap poses the effectiveness evaluation entirely prospectively.<sup>21</sup> This is clear from the similarity of the Roadmap's effectiveness and relevancy questions. At no point does the Roadmap raise the vital questions of what the Consortia BER has achieved and what would have occurred in its absence. Consistently with the Better Regulation Guidelines, the following sections will discuss the effectiveness criterion.

### 3.1 What is the aim of the Consortia BER?

Article 103(2) TFEU establishes that all block exemptions are designed '*to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest extent possible on the other.*'<sup>22</sup> As for the Consortia BER specifically, empowering Council Regulation No

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<sup>13</sup> Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application, recital 1

<sup>14</sup> Case M.8472 – *Nippon Yusen Kabushiki Kaisha/Mitsui OSK Lines/Kawasaki Kisen Kaisha/JV*, recital 5

<sup>15</sup> Case M.8330 - *Maersk/HSDG*, recital 49

<sup>16</sup> Case M.8330 - *Maersk/HSDG*, fn.56

<sup>17</sup> Case M.8330 - *Maersk/HSDG*, recital 49

<sup>18</sup> Better Regulation Guidelines, p.60

<sup>19</sup> Better Regulation Guidelines, p.57

<sup>20</sup> Better Regulation Guidelines, p.60

<sup>21</sup> Evaluation Roadmap, p.2

<sup>22</sup> Article 103(2)(b) TFEU

246/2009 sets out the related aims of achieving economies of scale,<sup>23</sup> allowing the EU shipping industry to be globally competitive,<sup>24</sup> reducing costs, improving quality,<sup>25</sup> and making it easier for undertakings to cooperate in an economically desirable way,<sup>26</sup> while ensuring that customers receive a fair share of the benefits.<sup>27</sup>

### 3.2 Has the Consortia BER been effective in achieving these aims?

Entering into VSAs and consortia would have been harder had the Consortia BER not been renewed. As noted in section 6 below, there is no sector-specific guidance for liner shipping beyond the Consortia BER. Accordingly, compliance costs would have been higher and legal certainty would have been lower. This is particularly important because companies would have had to engage in multiple self-assessments. As Council Regulation 246/2009 notes, *'the scope, parties, activities or terms of consortia are frequently altered'*.<sup>28</sup> Whenever such a change has occurred, in the absence of the BER, a new assessment would have to be carried out, without any guidance. Consider the number of changes just with respect to even the largest multi-trade VSAs over the years, setting aside the much more numerous single-trade arrangements:

Development of Multitrade Agreements/Alliances					
1996	Global Alliance	Grand Alliance	Hanjin/Tricon		CKY
<b>Main Partners</b>	APL, Nedlloyd, MOL, OOCL, MISC	Hapag-Lloyd, NYK, NOL, P&OCL.	Cho DSR/Senator, Hanjin	Yang	COSCO, K-Line, Yang Ming
2000	New World Alliance (NWA)	Grand Alliance	United Alliance		CKY
<b>Main Partners</b>	APL-NOL, MOL, HMM	Hapag-Lloyd, P&O, Nedlloyd, OOCL, MISC, NYK	Cho DSR/Senator, Hanjin	Yang	COSCO, K-Line, Yang Ming
2006	New World Alliance (NWA)	Grand Alliance	CKYH		
<b>Main Partners</b>	APL-NOL, MOL, HMM	Hapag-Lloyd, OOCL, MISC, Berhad, NYK	Hanjin, Ming, K	Yang Line,	COSCO
2010	New World Alliance (NWA)	Grand Alliance	CKYH		
<b>Main Partners</b>	APL-NOL, MOL, HMM	NYK, Hapag-Lloyd, OOCL	Hanjin, Ming, K	Yang Line,	COSCO

<sup>23</sup> 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) ("Council Regulation"), recital 4

<sup>24</sup> Council Regulation, recital 4

<sup>25</sup> Council Regulation, recital 7

<sup>26</sup> Council Regulation, recital 8

<sup>27</sup> Council Regulation, recital 10

<sup>28</sup> Council Regulation., recital 9

2015	2M	G6	CKYHE	O3
<b>Main Partners</b>	Maersk, MSC	Hapag-Lloyd, MOL, NYK, APL-NOL, Hyundai, OOCL	Hanjin, Yang Ming, K Line, COSCO, Evergreen	CMA-CGM, China Shipping, UASC
2017	2M	THE	OCEAN	
<b>Main Partners</b>	Maersk, MSC (HMM slots)	Hapag-Lloyd, K Line, MOL, NYK <sup>29</sup> , Yang Ming	China COSCO, Evergreen, CMA- CGM, OOCL	

Most shipping companies are members of numerous different consortia. For example, at the time of their merger, Hapag-Lloyd and UASC were members of 19 different consortia to and from the EU, which were active on 45 different trades (not including bi-directional trades)<sup>30</sup>. Overseas Orient International and COSCO were members of seven consortia to and from the EU, which were cumulatively active on twelve trades.<sup>31</sup> Similarly, Maersk and HSDG were active on seven consortia, which were cumulatively active on 13 trades to and from the EU.<sup>32</sup> Given that facilitating economically efficient cooperation and simplifying administration are two of the Consortia BER's aims, these facts alone establish that it was effective in promoting efficiency-enhancing cooperation.

The lack of a Consortia BER would be particularly harmful for single trade VSAs. In general, these fall well within the BER's thresholds and are essential to respond to short-term fluctuations in demand. In relative terms, the costs of compliance would be significantly higher for these VSAs. The necessary flexibility of such agreements also means that they are frequently altered or replaced entirely. Absent the Consortia BER, carriers would be discouraged from entering into and altering arrangements of this kind, depriving them and their customers of the efficiency-enhancing benefits that VSAs incontrovertibly provide.

The distinguishing feature of liner shipping is the response to shippers' need for service that is frequent and regular.<sup>33</sup> Accordingly, the risk that the establishment of a joint service might be delayed because of the need to assess whether the underlying agreement is void under Article 101(2) TFEU could be intolerable. Despite the network benefits that a joint service would provide, the delays and uncertainties associated with legal assessment would put shipping companies contemplating a joint service at a disadvantage from a shipper's perspective and could also lead to higher financing costs for carriers by increasing risk.

#### 4. HOW EFFICIENT HAS THE CONSORTIA BER BEEN?

An efficiency evaluation should consider the costs and benefits of the BER.<sup>34</sup> Where appropriate, the evaluation should pin-point areas where there is potential to reduce inefficiencies, particularly unnecessary regulatory costs, and simplify legislation. However, opportunities to simplify the legislation or reduce unnecessary regulatory costs should not undermine the intended objectives of the BER.<sup>35</sup>

<sup>29</sup> As noted above, K-Line, MOL and NYK have integrated their container businesses into the newly established Ocean Network Express or ONE, which commenced operations as a single ocean carrier on April 1, 2018.

<sup>30</sup> Case M.8120 – *Hapag-Lloyd/UASC*, tables 1 and 2; excluding the G6

<sup>31</sup> Case M.8594 – *COSCO Shipping/OOIL*, recital 30

<sup>32</sup> Case M.8330 – *Maersk/HSDG*, table 1

<sup>33</sup> Case M.8330 – *Maersk/HSDG*, recital 11

<sup>34</sup> Better Regulation Guidelines, p.60

<sup>35</sup> Better Regulation Guidelines, p.61

The Consortia BER has proven to be straightforward to apply in practice. Non-renewal would undoubtedly increase compliance costs for liner shipping companies, especially for smaller companies, and deter the establishment of efficiency-enhancing cooperation that benefits shippers. Any increase in costs for the liner shipping industry would also impact European end consumers in almost all markets.

Moreover, from an enforcement perspective, non-renewal could lead to the Commission wasting resources on complaints and investigations of consortia that are indisputably pro-competitive. By contrast, the Commission has committed considerable resources over many years to the investigation of airline alliances: these have produced an *acquis* on alliances which does not exist on consortia – but which is likely to have been far more burdensome to the Commission than the periodical review of the Consortia BER.

While non-renewal might in theory simplify the competition rules, it would in practice both complicate compliance and also undermine the aim of facilitating economically efficient cooperation. Therefore, 'the general policy of harmonising competition rules' cannot be a sufficient basis for non-renewal.

An additional benefit of renewing the Consortia BER is that it ensures a regulatory level playing field between the EU and other major trading blocs. Most jurisdictions, including the US and China, have regulatory systems in place to guarantee that certain VSAs will not be subject to *ex post* antitrust scrutiny, whilst Hong Kong, Singapore, Israel, and Malaysia have adopted block exemptions which confer antitrust immunity on consortia-type arrangements. If the EU were to decide not to confer legal certainty on consortia, carriers whose operations are focused on European trades will be at a competitive disadvantage, and European buyers will suffer a deterioration in service quality and costs of supply. For these reasons, the Commission will need to include an assessment of the impact of non-renewal of the BER on costs for European shippers, buyers and consumers.

## 5. HOW RELEVANT IS THE CONSORTIA BER?

The Commission has identified significant developments in the industry and the modes of cooperation between carriers as factors to consider in evaluating whether the Consortia BER remains relevant.

### 5.1 Has consolidation undermined the rationale for the Consortia BER?

The recent consolidation in liner shipping has not undermined the Consortia BER. As explained above, the market remains 'rather fragmented' and is not close to a point where even the leading companies could maintain their level of service individually. In fact, the increase in high capacity vessels has made the Consortia BER more relevant than ever.

Nor has consolidation increased consortia market shares to the point that the BER is redundant. The majority of consortia fall within the BER's market share threshold. Even with respect to the three large alliances, on the two biggest east-west trade lanes touching Europe, four of the six alliance/trade-lane pairs were under the 30% threshold in May of 2018, according to Alphaliner. Specifically, the largest alliances had market shares of 38% (2M), 34% (Ocean), and 24% (THE) in the Far East-Europe trade, and 23% (2M), 16% (Ocean), and 19% (THE) in the Europe- North America trade. (Market shares based on capacity.)

### 5.2 Are there alternative modes of cooperation?

The decisional practice of the Commission has stated that vessel sharing agreements and slot charter agreements are the only viable modes of cooperation in the liner shipping industry.<sup>36</sup> Under a slot charter agreement, the charterer simply rents slots on a vessel

owned by a different company. Slot charter agreements are appropriate if a company needs to service customers on a specific trade without deploying ships.<sup>37</sup> By comparison, when the Commission decided not to renew the Insurance BER exemption for pooling agreements, it noted that alternative forms of cooperation that 'play a similar role' already existed.<sup>38</sup>

## 6. HOW COHERENT IS THE CONSORTIA BER WITH OTHER EU ACTIONS?

The Commission has previously found that the general policy of harmonising competition rules is only an appropriate justification for removing sector-specific block exemptions if there is already equivalent Commission guidance in place to self-assess the specific form of cooperation in the sector in question.<sup>39</sup> Removing a block exemption is not appropriate if it would lead to a disproportionately costly competition law assessment.<sup>40</sup>

The peculiar features of liner shipping consortia mean that the general guidance in the Horizontal Guidelines, Article 101(3) Guidelines and Specialisation BER do not offer self-assessment guidance equivalent to the Consortia BER.

### 6.1 The Horizontal Guidelines are not sufficient

While section four of the Horizontal Guidelines addresses 'Production Agreements', it dedicates only four paragraphs to their assessment under Article 101(3) TFEU. Those paragraphs are of an entirely general nature,<sup>41</sup> and the examples provided bear no relationship to the kinds of cooperation found in consortia.<sup>42</sup>

By contrast, the Horizontal Guidelines extensively address the application of Article 101(3) to information exchanges and note their applicability to the insurance sector in particular.<sup>43</sup> The Commission explicitly commented on this when determining that the Insurance BER was unnecessary because the Horizontal Guidelines provided sufficient guidance to self-assess without disproportionately increasing compliance costs.<sup>44</sup> The Commission also noted that the *lack of* specific advice on information exchanges in the 2001 version of the Horizontal Guidelines justified its earlier decision to *renew* the Insurance BER.<sup>45</sup>

### 6.2 The Article 101(3) Guidelines are not sufficient

By their very nature, the 101(3) Guidelines are only of general application. They must be applied 'reasonably and flexibly' according to 'the circumstances specific to each case'.<sup>46</sup> They cannot be considered equivalent to the Consortia BER, which applies to the specific forms of cooperation unique to liner shipping.<sup>47</sup>

Under the 101(3) Guidelines, self-assessment of cost efficiencies requires the undertakings to 'calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed'.<sup>48</sup> This rigorous self-assessment by every member of every consortium would be inappropriate for arrangements that are wide-spread and manifestly beneficial to consumers and would dramatically increase compliance costs.

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<sup>37</sup> Case M.8330 - *Maersk/HSDG*, recital 54

<sup>38</sup> See Report from the Commission to the European Parliament and the Council on the functioning of Commission Regulation (EU) No 267/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector ("IBER report"), para 41  
<sup>39</sup> IBER report, para 31

<sup>40</sup> Commission Staff Working Document, Impact Assessment – HT. 4012 – IBER ("IBER Working Document"), para 127  
<sup>41</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements ("Horizontal Guidelines"), paras 183-6

<sup>42</sup> Horizontal Guidelines, paras 187-193

<sup>43</sup> Horizontal Guidelines, para 97

<sup>44</sup> See IBER report, paras 28-30; and IBER Working Document, para 104, 127

<sup>45</sup> IBER Working Document, para 69

<sup>46</sup> Guidelines on the application of Article 101(3) of the Treaty ("101(3) Guidelines"), para 6

<sup>47</sup> Consortia BER, Article 3

<sup>48</sup> 101(3) Guidelines, para 56

Similarly, the 101(3) Guidelines state that market shares are not considered sufficient to prove that competition has not been eliminated. The assessment must also include consideration of the capacity of actual competitors to compete and their incentive to do so.<sup>49</sup> Again, this cannot be considered equivalent to the clarity provided by the bright line rules in the Consortia BER and would lead to a disproportionate increase in compliance costs.<sup>50</sup>

The 101(3) Guidelines are even more general than the Horizontal Guidelines, which provide specific advice on certain types of horizontal agreements (albeit, not consortia). In this regard, it is telling that the Commission did not even argue that the 101(3) Guidelines provided a sufficient basis to self-assess in the insurance sector.<sup>51</sup>

### 6.3 The Specialisation Block Exemption Regulation is not sufficient

While the Specialisation BER does apply to the joint supply of services, it would not block exempt many arrangements to which the Consortia BER currently applies or provide the same level of specificity, and thus legal certainty, as the Consortia BER. Unlike the Specialisation BER, the Consortia BER specifically defines the forms of cooperation between liner shipping companies that benefit from the BER and itemises the range of cooperative activities<sup>52</sup>, the ancillary restrictions<sup>53</sup>, and the maximum notice periods<sup>54</sup> which are compatible with Article 101(3). This provides guidance and legal certainty which is wholly absent from the Specialisation BER.

Moreover, the market share threshold in the Specialisation BER is markedly lower than that in the Consortia BER: 20% and 30%, respectively.<sup>55</sup> The lower 20% threshold is particularly problematic because a consortium's market share is determined by combining the market share of all the consortium's members inside and outside the consortium in the relevant market.<sup>56</sup> A threshold of 20% would significantly reduce the number of consortia which could benefit from block exemption and increase the number which fall for self-assessment, whilst also depriving them of the consortia-specific guidance that the Consortia BER provides.

Accordingly, the Specialisation BER does not provide an equivalent degree of guidance, protection or legal certainty as the Consortia BER.

## 7. WHAT IS THE EU ADDED VALUE OF THE CONSORTIA BER?

The EU added value evaluation should consider the value resulting from EU action that is additional to the value that would have resulted from intervention at *regional or national* level by public authorities and the private sector.<sup>57</sup> The Roadmap incorrectly addresses the value added criterion by considering the added value of the Consortia BER over other Commission measures, such as the Horizontal guidelines and Article 101(3) guidelines.<sup>58</sup>

The benefits of the Consortia BER could not be achieved at a national level. Only the Commission is empowered to issue block exemptions to the application of Article 101 TFEU.<sup>59</sup> Moreover, the way that liner shipping markets have been consistently defined by

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<sup>49</sup> 101(3) Guidelines, para 109

<sup>50</sup> See Consortia BER, recital 9

<sup>51</sup> IBER report and IBER Working Document

<sup>52</sup> See Article 3(1)-(3) of the Consortia BER

<sup>53</sup> See Article 3(4) of the Consortia BER

<sup>54</sup> See Article 6 of the Consortia BER

<sup>55</sup> Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements ("Specialisation BER"), Article 3; and Consortia BER, Article 5. The Specialisation BER and Consortia BER also have different grace periods in the event that their respective market shares are exceeded: see Article 5 of each Regulation.

<sup>56</sup> Consortia BER, recital 10

<sup>57</sup> Better Regulation Guidelines, p.63

<sup>58</sup> Evaluation roadmap, p.2

<sup>59</sup> Article 103 TFEU



the Commission on the basis of trade routes serving regions composed of multiple EU member states (such as Northern Europe) makes an EU block exemption manifestly superior to any measure that might be adopted at national level.

In this context, it is also important to note the significant influence the Consortia BER has had on other jurisdictions when they have deliberated on the proper regulation of consortia under their own antitrust laws. By providing a model which has been widely followed internationally, the Consortia BER has contributed to international comity and the intellectual leadership of the EU in the international antitrust community.

## 8. **CONCLUSION**

Renewing the Consortia BER satisfies all of the conditions of the Better Regulations Guidelines. The Consortia BER has made it easier for liner shipping companies to cooperate in an economically efficient manner for over two decades. The modest consolidation over the past five years has not undermined the BER's viability. There is neither an alternative method for companies to self-assess with the same degree of legal certainty nor an alternative form of cooperation that could achieve the same efficiencies. Therefore, the Consortia BER should be extended for a five-year period beyond its currently scheduled 2020 expiration date.

WSC, ECSA and ICS look forward to a constructive dialogue with the Commission and all stakeholders throughout the review process.

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