

COMMISSION CONSULTATIONS ON
PROPOSED PROLONGATION OF CONSORTIA BLOCK EXEMPTION
REGULATION
&
ROADMAP FOR PROLONGATION OF CONSORTIA BLOCK EXEMPTION
REGULATION
SUBMISSION
20 December 2019



**International
Chamber of Shipping**
Shaping the Future of Shipping



WORLD SHIPPING COUNCIL
PARTNERS IN TRADE

I. Introduction

1. Following its evaluation of Commission Regulation (EC) No 906/2009 (the “Consortia BER”), conducted in Q4 2018 – Q3 2019 (the “Evaluation”), the Commission published on 20 November 2019: (i) a Staff Working Document (“SWD”) reflecting the findings of the Evaluation; (ii) an Executive Summary of the Evaluation; (iii) a Roadmap concerning the Commission’s intention to prolong the Consortia BER by four years (the “Roadmap”); and (iv) a draft Commission Regulation amending the Consortia BER as regards its period of application, so that it would apply until 25 April 2024 (the “Draft Regulation”) (documents (i)-(iv) collectively, the “Proposal”).
2. In parallel with the publication of the Proposal, the Commission opened two public consultations: a consultation on the Roadmap; and a consultation on the Draft Regulation (together, the “Consultations”). Noting that the Consultations “*relate to the same initiative, i.e. the prolongation of the Consortia BER*” and that the content of the Consultations is “*basically identical*”,¹ the Commission has invited all interested parties to submit their comments on both Consultations (or one of them) using the same form.
3. Accordingly, the present submission is made in response to both Consultations on behalf of the World Shipping Council (“WSC”), the International Chamber of Shipping (“ICS”) and the Asian Shipowners’ Association (“ASA”) (collectively, the “Parties”).²

II. Findings of the Evaluation

4. The Parties have carefully reviewed the Proposal and they welcome the Commission’s substantive findings. In particular, the Parties endorse the conclusions at Sections 5.1 – 5.5 of the SWD that:
 - a) the Consortia BER is effective because it facilitates the conclusion of consortia agreements by making the Article 101 TFEU assessment easier and by providing higher legal certainty than self-assessment;
 - b) the Consortia BER is efficient because it helps reduce compliance costs;

¹ See respectively https://ec.europa.eu/competition/consultations/2019_cber_prolongation/index_en.html and Section C of the Roadmap.

² EU Transparency Register Numbers: WSC: 32416571968-71 / ICS: 90104608462-14 / ASA: 758817833399-63.

- c) the Consortia BER is relevant because it facilitates cooperation that generates efficiency gains and benefits consumers; in this regard, the Parties support in particular the findings/indications that:
- i. concentration levels did not have negative effects on liner shipping prices; prices actually decreased during the period considered, in line with a decrease in carriers' costs;³
 - ii. the Consortia BER has not increased the bargaining power of carriers towards ports and terminals to the detriment of customers;⁴
 - iii. there is no causal link between the Consortia BER and the alleged challenges and disturbances to terminals caused by ultra large container vessels (ULCVs);⁵
 - iv. *“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”*;⁶
 - v. *“cost efficiencies have been passed on to customers to a material extent over the evaluation period”*;⁷
 - vi. *“quality of services has not deteriorated but rather remained stable since 2014”*.⁸
- d) the Consortia BER is coherent with the broader policies and objectives of the EU, as it reduces the environmental impact of maritime transport and contributes to the global competitiveness of the EU's shipping sector; and
- e) the Consortia BER provides EU added value.

³ SWD, page 24.

⁴ SWD, page 25.

⁵ SWD, page 26.

⁶ SWD, page 27.

⁷ SWD, page 29.

⁸ SWD, page 32.

5. Overall, the findings reflected in the Proposal are consistent with the submissions made by the Parties throughout the Evaluation, in particular their submission of 20 December 2018, WSC’s submission of 14 March 2019 (on pass-on and service quality), and the briefing paper submitted by WSC and the European Community Shipowners’ Associations (“ECSA”) on 12 June 2019 (on the relationship between the Consortia BER and EU climate action).

III. Proposed duration of the prolongation

6. The Draft Regulation would amend Article 7 of the Consortia BER by replacing the current expiry date “25 April 2020” with the date “25 April 2024”. Recital 4 of the Draft Regulation, reproduced below, addresses the Commission’s rationale for a four-year, rather than a five-year, prolongation of the Consortia BER:

“In order to allow the Commission to take into account possible changes in market circumstances and in line with the Commission’s powers under Article 2, paragraphs 1 and 2 of Regulation (EC) No 246/2009, the period of application of [the Consortia BER] should only be extended by four years”.

7. For the reasons that follow, the Parties respectfully submit that a prolongation of the Consortia BER by four years is inconsistent with the provisions of Council Regulation (EC) No 246/2009 (the “Consortia Empowering Regulation”).⁹ Based on the provisions of the Consortia Empowering Regulation, and in light of the Commission’s conclusion that it is appropriate to prolong the Consortia BER, it should do so for a period of five years.
8. The Commission’s power to adopt the Draft Regulation is derived from Article 1(1) of the Consortia Empowering Regulation. This is evident from the Preamble to the Draft Regulation, which states “*Having regard to [the Consortia Empowering Regulation], and in particular Article 1 thereof*”; it is also evident from the fact that there is no provision in the Consortia Empowering Regulation specifically concerning extensions or prolongations of the Consortia BER.

⁹ 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) (Codified version), OJ (2009) L 79/1.

9. If the Commission chooses to exercise its power under Article 1(1) of the Consortia Empowering Regulation, it must do so in accordance with Article 2(1) of the Consortia Empowering Regulation. This states that: “[t]he Regulation adopted pursuant to Article 1 shall apply for a period of five years, calculated as from the date of its entry into force” (emphasis added).
10. Article 2(1) does not give the Commission discretion to choose the period of application. This is evident from the phrase “shall apply”. According to the Commission’s guidance in the “*English Style Guide, A handbook for authors and translators in the European Commission*”, the word “shall” denotes a “positive imperative”: “[t]o impose an obligation or a requirement, EU legislation uses shall [...] shall means the same as must”.¹⁰ Accordingly, Article 2(1) of the Consortia Empowering Regulation should be interpreted as follows: the Regulation adopted pursuant to Article 1 must apply for a period of five years. This interpretation is also supported by the French and German language versions of Article 2(1).¹¹
11. If the Council had intended to grant the Commission discretion as regards the BER’s period of application, it would have used different wording in Article 2(1) of the Consortia Empowering Regulation. This is clear from several other empowering regulations adopted by the Council. For instance:

¹⁰ English Style Guide, A handbook for authors and translators in the European Commission (last updated 31 October 2019), paragraph 10.23, available at https://ec.europa.eu/info/sites/info/files/styleguide_english_dgt_en.pdf

¹¹ The French language version of Article 2(1) of the Consortia Empowering Regulation states: “*Le règlement arrêté en application de l'article 1er est applicable pendant une période de cinq ans, calculée à partir de la date de son entrée en vigueur*” (Unofficial translation: “The regulation adopted pursuant to Article 1 is applicable for a period of five years, calculated from the date of its entry into force”). The German language version of Article 2(1) of the Consortia Empowering Regulation states: “*Die gemäß Artikel 1 erlassene Verordnung gilt für einen Zeitraum von fünf Jahren ab ihrem Inkrafttreten*” (Unofficial translation: “The regulation adopted pursuant to Article 1 applies for a period of five years from its entry into force”).

- a) Regulation No 19/65/EEC,¹² which the Commission relied on to adopt the Vertical BER,¹³ the Motor Vehicle BER,¹⁴ and the Technology Transfer BER,¹⁵ states in Article 2(1) that: “A *regulation pursuant to Article 1 shall be made for a specified period*” (emphasis added). This wording, which is less prescriptive than the wording used in the Consortia Empowering Regulation, allowed the Commission to choose a 12-year application period for the Vertical and Technology Transfer BERs and a 13-year application period for the Motor Vehicle BER.¹⁶
- b) Regulation (EEC) No 2821/71,¹⁷ which the Commission relied on to adopt the Research & Development BER¹⁸ and the Specialisation BER,¹⁹ states in Article 2(1) that: “Any *regulation pursuant to Article 1 shall be made for a specified period*” (emphasis added). This wording, which mirrors the non-prescriptive wording used in Regulation No 19/65/EEC, allowed the Commission to choose 12-year application periods for the Research & Development and Specialisation BERs.²⁰
- c) Regulation (EEC) No 1534/91,²¹ which the Commission relied on to adopt the Insurance BER (no longer in force),²² states in Article 2 that: “Any *Regulation*

¹² Regulation No 19/65/EEC of the Council of 2 March 1965 on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, OJ (1965) P 36/533.

¹³ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ (2010) L 102/1 (“Vertical BER”).

¹⁴ Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ (2010) L 129/52 (“Motor Vehicle BER”).

¹⁵ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ (2014) L 93/17 (“Technology Transfer BER”).

¹⁶ See Vertical BER, Article 10; Technology Transfer BER, Article 11; Motor Vehicle BER, Article 8.

¹⁷ Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices, OJ (1971) L 285/46.

¹⁸ Commission Regulation (EU) No 1217/2010 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 research and development agreements, OJ (2010) L 335/36 (“Research & Development BER”).

¹⁹ 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, OJ (2010) L 335/43 (“Specialisation BER”).

²⁰ See Research & Development BER, Article 9; Specialisation BER, Article 7.

²¹ Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ (1991) L 143/1.

²² Commission Regulation (EU) No 267/2010 of 24 March 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, OJ (2010) L 83/1 (“Insurance BER”).

adopted pursuant to Article 1 shall be of limited duration” (emphasis added). This wording, which again is less prescriptive than the wording in the Consortia Empowering Regulation, allowed the Commission to choose a 7-year application period for the Insurance BER.²³

12. Regulation No 19/65/EEC, Regulation (EEC) No 2821/71, and Regulation (EEC) No 1534/91 demonstrate that the Council could have included non-prescriptive wording in the Consortia Empowering Regulation, leaving it to the Commission to determine an appropriate period of application. However, the Council did not do so. Instead, the Council made the determination itself, specifying that a regulation adopted pursuant to the Consortia Empowering Regulation must apply for five years.
13. As regards the rationale presented by the Commission for deviating from the five-year period, reflected in recital 4 of the Draft Regulation, the Parties respectfully submit the following observations.
14. First, the Parties would question whether it is correct to refer to the “Commission’s powers” under Article 2(1) of the Consortia Empowering Regulation. As noted above, the Parties do not interpret Article 2(1) as giving the Commission ‘powers’ in the sense of discretion to choose a duration but rather providing an instruction that the Commission should follow if it chooses to exercise its powers under Article 1(1) of the Consortia Empowering Regulation.
15. Second, recital 4 refers to Article 2(2) of the Consortia Empowering Regulation, which states as follows: “*The Regulation adopted pursuant to Article 1 may be repealed or amended where circumstances have changed with respect to any of the facts which were basic to its adoption*”. The Parties interpret this provision to mean that, if there is a fundamental change in circumstances, the Commission is empowered to repeal or amend the Consortia BER. That power would only be triggered, however, when a change in circumstances has actually occurred.
16. The Parties do not interpret Article 2(2) as empowering the Commission to preempt hypothetical “*possible changes in market circumstances*” by adopting a regulation for a period shorter than that specified in Article 2(1) of the Consortia Empowering

²³ Insurance BER, Article 9.

Regulation. In any event, the Parties submit that there is no need for the Commission to engage in such preemption: if circumstances fundamentally change during the Consortia BER's five-year period of application, the Commission can – at that stage – rely on Article 2(2) of the Consortia Empowering Regulation to amend or repeal the Consortia BER.

17. For all of the above reasons, the Parties respectfully submit that the Commission should amend Article 1 and recital 4 of the Draft Regulation to effectuate a five-year prolongation of the Consortia BER, until 25 April 2025.

IV. Conclusion

18. The Parties support the substantive findings of the Evaluation and the Commission's intention to prolong the Consortia BER. As regards the prolongation, however, the Parties respectfully submit that the correct period of application is five years, rather than four.