

# UK competition law: Liner Shipping Consortia Block Exemption Regulation

Consultation Document

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# 1. About the Consultation

## Introduction

- 1.1 The purpose of this consultation is to seek views on the CMA's proposed recommendation to the Secretary of State for Business, Energy and Industrial Strategy (Secretary of State) as to whether or not the existing retained Liner Shipping Consortia Block Exemption Regulation (the retained CBER) should be renewed or varied when it expires on 25 April 2024.<sup>1</sup>
- 1.2 The retained CBER was retained in United Kingdom (UK) law following the UK's withdrawal from the European Union (EU) and the end of the Transition Period.<sup>2</sup> The retained CBER sets out an automatic exemption for certain agreements between liner shipping companies offering international liner shipping services from or to one or more ports in the UK, allowing them to cooperate and provide joint services through 'consortia'. This includes the joint operation of liner shipping services, capacity adjustments in response to fluctuations in supply and demand, the joint operation or use of port terminals, and certain other ancillary activities. The CBER does not allow liner shipping companies to agree to fix prices, otherwise limit capacity or sales, or allocate markets or customers.
- 1.3 The Competition Act 1998 (the Act) prohibits anticompetitive agreements between businesses (known as the Chapter I prohibition).<sup>3</sup> The prohibition applies to agreements and concerted practices between undertakings and to decisions by associations of undertakings (eg trade associations), which have as their object or effect the prevention, restriction or distortion of competition within the UK and which may affect trade within the UK.
- 1.4 However, section 9(1) of the Act provides that an agreement is exempt from the Chapter I prohibition if it:
  - a) contributes to

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<sup>1</sup> Regulation 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). The CBER is one of the 'retained exemptions' from EU law that was retained in UK law after EU law generally ceased to have effect in the UK on 1 January 2021, as a result of a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020. The CMA is aware of the [Retained European Union Law \(Revocation and Reform\) \(REUL\) Bill](#), which will sunset the majority of the European Union law that has been retained in the UK so that it expires on 31 December 2023. If passed as currently drafted, the retained CBER will consequently also expire on 31 December 2023, ie earlier than the expiry date set out in the retained CBER.

<sup>2</sup> Previously, the EU CBER applied in the UK. The block exemption set out in the EU CBER is substantively the same as the retained CBER except that it applies to the EU rather than the UK.

<sup>3</sup> The Competition Act 1998, section 2.

- (i) improving production or distribution, or
  - (ii) promoting technical or economic progress
- b) while allowing consumers a fair share of the resulting benefit; and
- c) does not
  - (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
  - (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- 1.5 An agreement may be individually recognised as exempt by a competition authority or a court and, in addition, certain types of agreement will be treated as automatically exempt if they meet conditions set out in a ‘block exemption’ regulation or order applicable to that category of agreements.
- 1.6 Block exemptions have several benefits for businesses. First, they provide legal certainty to businesses as they enable them to know in advance how to ensure that their agreements comply with competition law. Second, they avoid placing on businesses the burden of scrutinising a large number of agreements that are likely to satisfy the requirements for exemption under section 9(1) of the Act. Third, the existence of a block exemption also ensures consistency of approach by providing a common framework for businesses to assess their agreements against the Chapter I prohibition.
- 1.7 Block exemptions also help to ensure that the CMA does not need to spend time scrutinising what are essentially benign agreements, and so is able to concentrate its resources on other matters that are more likely to give rise to significant competition concerns. In this regard, the CMA notes that the various conditions of the current block exemptions ensure they are unlikely to apply to agreements that may give rise to significant competition concerns.<sup>4</sup>
- 1.8 Following a preliminary review of the various issues, the CMA is proposing to recommend that the Secretary of State replace the retained CBER with a Liner Shipping Consortia Block Exemption Order (CBEO).
- 1.9 In its review of the retained CBER (the Review), formally launched in August 2022, the CMA has met with key stakeholders to gather views on the operation of the retained CBER regime in the UK. In particular, the CMA has

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<sup>4</sup> For example, through the operation of the market share threshold and list of hardcore restrictions.

taken into account the views expressed by representatives from the shipping and wider maritime logistics sector, including liner shipping firms, port operators, shippers, freight forwarders, and relevant trade associations. As the legal and economic background has changed since the retained CBER first came into force (as explained further in Section 3 below), the CMA has considered whether the retained CBER regime and its objectives remain appropriate, taking into account the specific features of the UK economy and the needs of UK consumers.

- 1.10 While the Review has taken into account UK-specific issues, the global nature of the liner shipping industry and the UK's integration within wider European shipping routes means that the retained CBER cannot be considered in isolation. As far as useful and relevant, the CMA has taken into account equivalent reviews conducted by other competition authorities and evidence submitted to these.<sup>5</sup> As part of the Review, the CMA has considered sector-specific reports and the relevant academic literature to inform its views. As the EU CBER applied in the UK during a period of the European Commission's (EC) previous review (before the end of the Transition Period), the CMA has also taken into consideration evidence from this earlier review where still relevant.<sup>6</sup>

## Scope of this consultation

- 1.11 This consultation document seeks views in accordance with sections 8(1) of the Act<sup>7</sup> on the CMA's proposed recommendation to the Secretary of State to replace the retained CBER with a CBEO under section 6(1) of the Act,<sup>8</sup> when it expires on 25 April 2024. As outlined in more detail below, this document includes consultation questions that stakeholders are invited to consider when providing their views on the CMA's proposed recommendation.
- 1.12 Section 2 provides a high-level overview of the CMA's proposed recommendation. Section 3 provides background on the liner shipping industry with regards to the UK. Sections 4 to 6 then provide more detail

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<sup>5</sup> The European Commission renewed its CBER in 2020 and launched [its own review](#) in August 2022, with feedback to a Call for Evidence published in October 2022. In addition, the Hong Kong Competition Commission renewed its [Vessel Sharing Agreements Block Exemption](#) in July 2022, while the [Australian Competition and Consumer Commission](#) has previously explored a possible class exemption for ocean carriers providing international liner cargo shipping services.

<sup>6</sup> In particular, the 2019 [Commission Staff Working Document of the Liner Shipping Consortia Block Exemption Regulation](#) (EC SWD 2019).

<sup>7</sup> Under section 8(1) of the Act, before making a recommendation under section 6(1), the CMA must publish details of its proposed recommendation in such a way as it thinks most suitable for bringing it to the attention of those likely to be affected; and consider any representations about it which are made.

<sup>8</sup> Under section 6(1) of the Act, if agreements which fall under a particular category of agreements are, in the opinion of the CMA, likely to be exempt agreements, the CMA may recommend that the Secretary of State make an order specifying that category for the purposes of this section.

about the CMA's recommendations in relation to specific issues. These sections also include questions on which we would appreciate stakeholder feedback, with these split into 'policy' and 'impact' questions.

- 1.13 Responses to the policy questions will inform our final recommendation to the Secretary of State. The responses to the impact questions will be used to inform the preparation by the Department for Business, Energy and Industrial Strategy (BEIS) of an impact assessment for any block exemption order that the Secretary of State may decide to make. Accordingly, responses to the present consultation may be shared with BEIS. For convenience, the list of consultation questions is set out in full in **Annex A**.
- 1.14 As explained further below, following the consultation initiated by this document, the CMA will prepare its final recommendation to the Secretary of State.
- 1.15 This consultation on the retained CBER is distinct from the EC's review of the EU CBER.

## **Consultation process**

### ***How to respond***

- 1.16 We are publishing this consultation document on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We welcome comments on the proposed recommendation to the Secretary of State on the introduction of any CBEO, as well as the specific issues we address in the proposed recommendation.
- 1.17 We encourage you to respond to the consultation in writing (by email) using the contact details provided below. Please provide supporting evidence or examples for your views where possible.
- 1.18 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 1.19 In accordance with our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. **If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on our webpages which omits that**

**material and which explains why you regard it as sensitive** (see also paragraph 1.28 below).

### ***Duration***

***The consultation will run from 19 January to 23 February 2023. Responses should be submitted by email by 5:00 p.m. on 23 February 2023 and should be sent to: [cberreview@cma.gov.uk](mailto:cberreview@cma.gov.uk)***

### ***Compliance with government consultation principles***

- 1.20 In preparing this consultation document, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.
- 1.21 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 1.22 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the proposed recommendation to the Secretary of State before it is finalised.
- 1.23 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 1.24 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need to exclude from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.



When submitting your response please also let us know if you wish to remain anonymous.

- 1.25 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, if you have made any representations about the confidentiality of any information contained in your response, we will take such representations into consideration. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 1.26 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

### ***Next steps***

- 1.27 After the consultation, the CMA will prepare its final recommendation to the Secretary of State.
- 1.28 The CMA will publish the final version of the recommendation to the Secretary of State on its webpages at <http://www.gov.uk/cma>. The CMA will also publish the responses received during the consultation (with any confidential information redacted). These documents will be available on our webpages and respondents will be notified when they are available.

## 2. The CMA's proposed recommendation

- 2.1 The CMA's proposed recommendation to the Secretary of State is to replace the retained CBER when it expires on 25 April 2024 with a Liner Shipping Consortia Block Exemption Order (CBEO) that is tailored to the needs of businesses operating in the UK and UK consumers.<sup>9</sup>
- 2.2 The CMA's proposal is that any CBEO would be broadly similar to the retained CBER, in order to ensure the continuity of the current regime for businesses, while making some amendments to improve the block exemption and provide clarity for members of the supply chain.
- 2.3 The CMA is provisionally of the view that a liner shipping consortia block exemption remains a relevant and useful tool for businesses that increases legal certainty compared to a situation where businesses would have to rely solely on self-assessment. Stakeholders, including some of those more critical of the retained CBER regime, have noted the efficiencies offered in theory by vessel sharing agreements (VSAs).<sup>10</sup> While some stakeholders representing shippers and forwarders considered that severe market disruptions (including the impact of higher freight prices and service delays) were directly caused or exacerbated by the retained CBER regime, other stakeholders consider that these market disruptions resulted from exogenous market shocks (see further paragraphs 4.7 to 4.12). Overall, the CMA has therefore not received sufficient evidence to justify letting the retained CBER expire without providing for its replacement.
- 2.4 In this context, the CMA considers that consortia liner shipping agreements falling below the 30% market share threshold are likely to continue to satisfy the requirements for exemption under section 9(1) of the Act.
- 2.5 Given this, the CMA is provisionally of the view that letting the retained CBER expire without providing for a replacement is not currently appropriate for the UK.
- 2.6 Overall, the CMA provisionally considers that the current retained CBER regime has proven to be appropriate and fit for purpose. The CMA therefore does not consider that major changes to the existing regulation is warranted.

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<sup>9</sup> The replacement will result in the adoption of a UK block exemption order under section 6 of the Act (Part I of the Act), the provisions of which will be interpreted in accordance with section 60A of the Act (see the CMA's [Guidance on the functions of the CMA after the end of the Transition Period](#) (Brexit Guidance), paragraphs 4.18–4.24).

<sup>10</sup> Meeting with European Association for Forwarding, Transport, Logistics and Customs Services (CLECAT); meeting with Global Shippers Forum; meeting with British International Freight Association (BIFA); meeting with Anonymous 1.

However, stakeholder feedback thus far also indicates that certain aspects of the retained CBER regime may need updating or revising, including providing greater clarity on certain key terms, such as ‘computerised data exchange system’ (Article 3(4)(a)), and the market share threshold of 30% (Article 5 (1)). We address these specific recommendations in more detail in Part 4.

### 3. Liner shipping and the UK

#### Overview

- 3.1 Liner shipping consists of regular and scheduled cargo transport on specific maritime routes.<sup>11</sup> Liner shipping companies, also known as liners or carriers, are the firms that provide these services. These firms can be party to consortia agreements focused on the joint provision of certain maritime services such as the coordination of sailing timetables or cross-chartering of vessel space.<sup>12</sup> Liners typically participate in several consortia. Given that liner shipping is a capital-intensive and highly cyclical industry, these consortia and vessel-sharing agreements allow for optimised routes and more effective capacity management than would otherwise be the case and support the more efficient deployment of vessels.<sup>13</sup> Stakeholders in favour of the CBER regime suggest that these cost savings and other efficiencies are passed on to customers such as shippers and, eventually, UK consumers in the form of lower prices.<sup>14</sup>
- 3.2 Other relevant participants in the wider liner shipping supply chain include shippers, who own the cargo being transported, and freight forwarders, who organise the transportation of goods on behalf of customers. Port operators provide services such as the handling of cargo. In theory, consortia agreements should also be of benefit to these other parties within the maritime logistics sector through, for example, more reliable port coverage, and the provision of better services such as improved schedules.<sup>15</sup>
- 3.3 The efficiencies mentioned in paragraphs 3.1 and 3.2 underpin the rationale for the retained CBER, which sets out that consortia agreements ‘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’.<sup>16</sup>

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<sup>11</sup> Article 2(2) of the retained CBER defines liner shipping as ‘the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an occasional basis, to any transport user against payment’.

<sup>12</sup> Article 3 of the retained CBER sets out consortia activities that are exempted from the Chapter I prohibition.

<sup>13</sup> EC 2019 SWD, pp6-7; see also recitals to the CBER; on the cyclical nature of the industry and demand uncertainty, see Jihye Jeon (2022) “Learning and Investment under Demand Uncertainty in Container Shipping” *The RAND Journal of Economics*, pp226-259.

<sup>14</sup> WSC, ICS, ASA (2022). Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation, pp47-48. The previous review of the EC CBER concluded that “cost efficiencies have been passed on to customers to a material extent over the evaluation period,” see EC 2019 SWD, p29.

<sup>15</sup> EC 2019 SWD, pp7-8.

<sup>16</sup> Retained CBER, recitals 5 and 6.

- 3.4 Containerised liner shipping services have underpinned the development of modern global supply chains, with the first transatlantic container lines servicing the UK launched in 1966.<sup>17</sup> Global container port throughput grew from 36 million twenty-foot equivalent units (TEU) in 1980 to 849 million TEU in 2021, interconnected with China’s rapid integration within global manufacturing supply chains.<sup>18</sup> This has been accompanied by a significant growth in the average size of vessels – the capacity of the largest container ships more than doubled in size during 2006 to 2022.<sup>19</sup> Overall container tonnage handled in the UK in 2021 stood at 63.4 million tonnes, five per cent below 2019 pre-pandemic levels.<sup>20</sup> The total capacity in TEU of liner services reaching UK ports as of September 2022 stood at 412,830, with around 70% of this capacity attributable to services provided under consortia agreements.<sup>21</sup>
- 3.5 As per the UN Committee on Trade and Development (UNCTAD), the UK ranks eighth globally in terms of liner shipping connectivity.<sup>22</sup> Of the world’s top 100 most well-connected container ports, three are located in the UK: Felixstowe (36), London Gateway (44), and Southampton (53).<sup>23</sup> Certain stakeholders maintain that consortia agreements positively contribute to the connectivity of UK ports.<sup>24</sup>
- 3.6 As an island economy, approximately 95% of all UK imports and exports by volume are moved by sea, with the liner shipping industry an important part of a broader UK maritime sector which supports £47 billion in annual business turnover and 220,100 jobs across the UK.<sup>25</sup> As of September 2022, UK ports

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<sup>17</sup> Daniel M. Bernhofen, Zouheir El-Sahli, Richard Kneller (2013). “[Estimating the Effects of the Container Revolution on World Trade](#)”, *CESifo Working Paper No. 4136*, p12.

<sup>18</sup> Theo Notteboom and Jean-Paul Rodrigue (2022). “[Maritime container terminal infrastructure, network corporatization, and global terminal operators: Implications for international business policy.](#)” *Journal of International Business Policy*, pp1-17; see also Daniel M. Bernhofen, Zouheir El-Sahli, Richard Kneller (2013). “[Estimating the Effects of the Container Revolution on World Trade](#)”, *CESifo Working Paper No. 4136*; UNCTAD (2022) *Review of Maritime Transport 2022*, p5; see also Hercules E. Haralambides (2019) “[Gigantism in container shipping, ports and global logistics: a time-lapse into the future](#)”. *Maritime Economics & Logistics* 21, pp9-10.

<sup>19</sup> UNCTAD (2022) *Review of Maritime Transport 2022*, p139.

<sup>20</sup> This also includes containers transported via ‘Short Sea’ routes and via transshipment. See: Department for Transport (2022) [Port freight annual statistics 2021: Cargo information and arrivals](#).

<sup>21</sup> It should be noted that total capacity does not represent actual TEU volumes transported. Data from Alphaliner services database, quoted in RBB Economics (2022) *Liner Shipping Consortia Block Exemption Regulation: an introductory note prepared at the request of the World Shipping Council*, p10.

<sup>22</sup> Figures for Q3 2022 taken from UNCTAD’s [liner shipping connectivity index \(LSCI\)](#). The LSCI takes into account the number of shipping lines servicing a country; the size of the largest vessel used on these services (in TEU); the number of services connecting a country to the other countries; the total number of vessels deployed in a country; and the total capacity of those vessels, in twenty-foot equivalent units (TEU).

<sup>23</sup> Figures for Q4 2022 taken from MDS Transmodal’s [Port Liner Shipping Connectivity Index \(LSCI\) platform](#); see Department of Transport (2022) [Future of freight: a long-term plan](#), pp16-17.

<sup>24</sup> RBB Economics (2022) *Liner Shipping Consortia Block Exemption Regulation: an introductory note prepared at the request of the World Shipping Council*, p9.

<sup>25</sup> See Department for International Trade (2022) [Embracing the ocean: a Board of Trade paper](#).

are served by 91 separate liner services, with 32 of these operated under consortia agreements.<sup>26</sup>

## Market developments

- 3.7 In making its proposed recommendation, the CMA is mindful of market developments in the sector since the introduction of the current CBER regime in 2009 and the latest renewal of the block exemption in 2020.<sup>27</sup> Below, we summarise these key developments including some of the perspectives of different stakeholder groups.
- 3.8 The coronavirus (COVID-19) pandemic and resulting disruptions to global supply chains profoundly impacted the liner shipping industry. Schedule reliability declined from 75% globally in May 2020 to 39% in May 2021, and freight rates increased to record levels.<sup>28</sup> Commentators also noted a rise in cancelled or skipped port calls (also known as ‘blank sailing’), including UK ports.<sup>29</sup> Russia’s invasion of Ukraine has also had an impact on port congestion in the UK in the last year, and general issues with port bottlenecks are expected to persist for some time.<sup>30</sup>
- 3.9 Both spot and contractual freight rates have generally reduced over the course of 2022 to levels approaching pre-pandemic rates (with this projected to impact liners’ profits in 2023) alongside improvements in schedule reliability.<sup>31</sup> However, certain stakeholders have made the case that problematic service reliability and high freight rates during the peak of the pandemic suggest that the benefits of the retained CBER regime are unfairly distributed.<sup>32</sup> In its most recent annual review of maritime transport, UNCTAD notes that the ‘high freight rates and poor service’ seen in the past two years suggest that the efficiency rationales that underpin the CBER and similar

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<sup>26</sup> Alphaliner data contained within RBB Economics (2022) *Liner Shipping Consortia Block Exemption Regulation: an introductory note prepared at the request of the World Shipping Council*, pp10-11.

<sup>27</sup> EC Regulation 246/2009 introduced the current block exemption regime for consortia agreements and was renewed without modification in 2014 and 2020. BERs for consortia agreements have been in place since 1995. Previously, EC Regulation 4056/86 had operated a block exemption for liner shipping conferences on routes to and from the EU; in contrast to consortia, liner shipping conferences involved the fixing of prices.

<sup>28</sup> UNCTAD (2021) *Review of Maritime Transport 2021*, p14, p58; see ITF (2022), “[Performance of Maritime Logistics](#)”, *International Transport Forum Policy Papers, No. 106*, pp12-17.

<sup>29</sup> UNCTAD (2022) *Review of Maritime Transport 2022*, p60, p64; see also *The Loadstar* (October 2021) “[Missed port calls a headache for feeder operators as stranded containers pile up](#)” and *The Maritime Executive* (December 2021) “[Carriers Skipped Quarter of European Port Calls due to Congestion](#)”.

<sup>30</sup> UNCTAD (2022) *Review of Maritime Transport 2022*, p44; RBB Economics (2022), *Response to the EC liner shipping CBER consultation, Prepared at the request of the World Shipping Council*, p26.

<sup>31</sup> Spot rates refer to freight shipments booked without a contract. UNCTAD (2022) *Review of Maritime Transport 2022*, p67; on forecasts for 2023, see FitchRatings (7 December 2022) “[Global Shipping Outlook Worsens on Lower Container Freight Rates](#)” and Seatrade Maritime News (3 January 2023) “[Container line schedule reliability improves in second half 2022.](#)”; the CMA notes that the Drewry World Container Index for both global and Shanghai-Rotterdam routes are now broadly comparable to pre-pandemic levels; see Index [here](#).

<sup>32</sup> Meeting with Global Shippers Forum; see also their submission to the EC’s 2022 call for evidence.

regulations may no longer exist.<sup>33</sup> Liners and related trade associations, in contrast, have suggested that these issues were the result of exogenous market shocks, and that consortia agreements were in any case very unlikely to have exacerbated their impact.<sup>34</sup>

- 3.10 Strategic alliances remain a noticeable feature of the global liner shipping industry, with three key alliances accounting for over 80% of global container trade by some estimates (and perhaps 95% of total capacity on East-West trade lanes).<sup>35</sup> Concentration in the global liner shipping market has increased in recent years.<sup>36</sup> Stakeholders representing shippers and freight forwarders have suggested that the retained CBER disproportionately benefits alliance members who already enjoy strong market positions.<sup>37</sup> These stakeholders note the role played by inter-alliance consortia agreements and suggest that these should be incorporated within calculations of total market shares.<sup>38</sup> However, liners and related trade associations consider that cross-alliance consortia are a longstanding feature of the industry,<sup>39</sup> and that alliance members still compete on price, customer relationships, and other independent service offerings.<sup>40</sup> Recent reviews of the industry have also concluded that there is limited evidence that alliances and schedule coordination (as under the retained CBER) were responsible for recent issues with freight rates and connectivity.<sup>41</sup>
- 3.11 The CMA is also aware of other trends in market structure, such as vertical integration. Liners have expanded into other areas of the supply chain through the acquisition of terminal operations as well as forwarding and intermodal transport services – the world’s four largest liners now also rank amongst the top ten port terminal operators, for example.<sup>42</sup> Freight forwarders have raised concerns around medium and smaller forwarders being impacted by liners

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<sup>33</sup> UNCTAD (2022) *Review of Maritime Transport 2022*, p143.

<sup>34</sup> Meeting with World Shipping Council (WSC); see also WSC’s joint submission to the EC’s call for evidence, submitted alongside the International Chamber of Shipping (ICS) and the Asian Shipowners’ Association (ASA).

<sup>35</sup> International Transport Forum (2018) *The Impact of Alliances in Container Shipping*, p7, p13, p33; the three key alliances are 2M, THE Alliance and the Ocean Alliance.

<sup>36</sup> See EC SWD (2019), p21; ITF (2019) “[Container Shipping in Europe: Data for the Evaluation of the EU Consortia Block Exemption](#)”, p38.

<sup>37</sup> Meeting with CLECAT; see also CLECAT’s submission to the EC’s review. CLECAT state that a lack of fair distribution of benefits to customers means that renewal of the CBER regime is not justified.

<sup>38</sup> Meeting with CLECAT; meeting with Global Shippers Forum. Stakeholders have made particular reference to Olaf Merk and Antonella Teodoro (2022). “[Alternative approaches to measuring concentration in liner shipping](#)”, *Maritime Economics & Logistics*, pp723–746.

<sup>39</sup> WSC, ICS, ASA (2022). Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation, pp33-34.

<sup>40</sup> WSC, ICS, ASA (2022). Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation, pp21-22.

<sup>41</sup> UNCTAD (2022) *Review of Maritime Transport 2022*, p144.

<sup>42</sup> UNCTAD (2022) *Review of Maritime Transport 2022*, p138, p143. The relative absence of carrier-controlled container terminals in the UK was, however, recognised by the OECD/ITF’s report; see International Transport Forum (2018) *The Impact of Alliances in Container Shipping*, p60; meeting with Anonymous 1.

withdrawing contract rates.<sup>43</sup> Others have raised concerns around independent forwarders' access to discounted rates from liners who are now operating and favouring their own forwarding services.<sup>44</sup> Certain stakeholders have also raised concerns around data exchange and liners' access to commercially sensitive information at different levels of the supply chain as a result of vertical integration.<sup>45</sup> Stakeholders representing liners have, in contrast, proposed that the retained CBER, given its focus on horizontal cooperation, is not the correct policy tool to account for any issues related to vertical integration and that no information is exchanged between consortia members beyond that required for the consortia's operation.<sup>46</sup>

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<sup>43</sup> Meeting with BIFA.

<sup>44</sup> Meeting with Global Shippers Forum; see also Global Shippers Forum's submission to the EC's Call for Evidence.

<sup>45</sup> Meeting with BIFA; meeting with CLECAT; meeting with Global Shippers Forum; meeting with BIFA; see also CLECAT and Global Shippers Forum's submissions to the EC's Call for Evidence.

<sup>46</sup> WSC, ICS, ASA (2022). *Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation*, pp34-35; see also RBB Economics (2022) *Liner Shipping Consortia Block Exemption Regulation: an introductory note prepared at the request of the World Shipping Council*, p3.



## 4. Retained CBER

### Overview of the block exemption

4.1 The retained CBER acts as a sector-specific block exemption, setting out an automatic exemption from the Chapter I prohibition (subject to meeting specific conditions) for certain agreements between liner shipping companies offering international liner shipping services from or to one or more ports in the UK.<sup>47</sup> This exemption applies if the combined market share of the parties to a consortia agreement does not exceed 30% on the relevant market upon which the consortium operates.<sup>48</sup> The exemption does not apply to a consortium agreement 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 or customers.<sup>49</sup> The retained CBER is due to expire on 25 April 2024.

### Intended objectives of the retained CBER

- 4.2 Consortia, of the type that fall within the scope of the retained CBER, can lead to improvements in productivity and the quality of available liner shipping services through the economies of scale they support in the operation of vessels and utilisation of port facilities.<sup>50</sup> By encouraging greater utilisation of containers and more efficient use of vessel capacity, customers can benefit from more widely available and better quality services to a larger range of ports.
- 4.3 An important benefit of the retained CBER is the legal certainty it provides for liners in the joint operation of certain liner shipping services. It provides a framework for liners to ensure that their agreements both comply with UK competition law and are consistent in approach. It also reduces the burden on these businesses to scrutinise agreements that are likely to satisfy the requirements for exemption under section 9(1) of the Act.
- 4.4 The retained CBER regime can also lead to positive outcomes for consumers through efficiencies in the supply chain. Specifically, wider coverage of ports and more regular scheduled services can provide consumers with access to a wider range of goods and within shorter timeframes than would otherwise be

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<sup>47</sup> With regards to horizontal cooperation more generally, the CMA also plans to consult on guidance related to the Research and Development Block Exemption Order (R&D BEO) and Specialisation Block Exemption Order (SBEO), as well as other forms of horizontal cooperation.

<sup>48</sup> Retained CBER, Article 5.

<sup>49</sup> Retained CBER, Article 4.

<sup>50</sup> Retained CBER, recital 5.

possible.<sup>51</sup> This can result in increased consumer choice and confidence in the market.

- 4.5 There are also environmental benefits associated with the capacity sharing of vessels. VSAs under the retained CBER can allow for fewer but better utilised liner ships in operation, thereby reducing environmental emissions in a similar way to public transport or carpooling. Larger vessels consume less fuel per cargo volume, with the capacity of vessels used in consortia two to four times larger than that of individual carriers in terms of services with UK port calls.<sup>52</sup>

## **General recommendation**

- 4.6 The CMA recommends that the retained CBER be replaced with a CBEO when it expires on 25 April 2024. The CMA's proposed recommendation reflects its findings from preliminary consultation with industry stakeholders to understand issues relevant to the operation of the retained CBER in the UK. These issues and the CMA's initial views are outlined in detail below.

### ***Pandemic disruptions***

- 4.7 Stakeholders noted that the COVID-19 pandemic has caused severe disruption to global supply chains since March 2020. During this time, customers have experienced high freight rates and significant delays in the shipment of goods.<sup>53</sup> The industry has also experienced congestion at ports and in hinterland transportation due to increases in consumer demand and labour shortages caused by lockdown requirements, industrial action, and illness.<sup>54</sup>
- 4.8 Some stakeholders have presented the high freight rates and decreased service reliability during the pandemic as representative of issues with the retained CBER regime,<sup>55</sup> while others attribute these changes in service quality and price to exogenous market shocks.<sup>56</sup> This latter group of stakeholders maintain that without the CBER regime in place during the

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<sup>51</sup> EC 2019 SWD, p28, p43.

<sup>52</sup> UNCTAD (2022) [Review of Maritime Transport 2022](#), p107; Alphaliner data contained within RBB Economics (2022) *Liner Shipping Consortia Block Exemption Regulation: an introductory note prepared at the request of the World Shipping Council*, pp10-11.

<sup>53</sup> See paragraphs 3.8-3.9 above. Meeting with Anonymous 1; meeting with CLECAT.

<sup>54</sup> See UNCTAD (2022) [Review of Maritime Transport 2022](#), p.xvii; UNCTAD (2021) [Review of Maritime Transport 2021](#), p.xvii.

<sup>55</sup> Meeting with Global Shippers Forum.

<sup>56</sup> Meeting with World Shipping Council.

pandemic, service quality and price would have been further adversely affected.<sup>57</sup>

- 4.9 The CMA notes that freight rates have decreased over the course of 2022, although in general they have not fully returned to the levels seen prior to the pandemic.<sup>58</sup> The CMA will continue to monitor freight rate developments as it produces its final recommendation.
- 4.10 The CMA has considered the context of the COVID-19 pandemic and whether the impacts seen during this period were exacerbated by the CBER regime. It notes that these impacts, such as higher prices and service delays, were negatively felt throughout the supply chain and to an extent, continue to be so.<sup>59</sup>
- 4.11 The CMA recognises the exceptional circumstances and issues faced by all members of the supply chain throughout the pandemic. However, the CMA has not received sufficient evidence that the impacts of higher freight rates and service delays were directly caused by the retained CBER regime. Indeed, stakeholders representing liners maintain that the level of consortia presence on trade routes was unrelated to freight rate developments during the pandemic.<sup>60</sup>
- 4.12 For the purposes of this Review, therefore, the CMA provisionally considers that the retained CBER has not been a contributing factor to the significant disruptions experienced during the pandemic. Given the various efficiencies associated with the CBER regime set out in this section, it provisionally concludes that the retained CBER remains an appropriate mechanism to facilitate joint services in the liner shipping industry and is therefore minded to recommend that the Secretary of State replaces it with a CBEO.
- 4.13 The CMA will continue to monitor trends occurring in the liner shipping industry to inform its final recommendation and future reviews of the proposed CBEO.

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<sup>57</sup> Meeting with World Shipping Council.

<sup>58</sup> See UNCTAD (2022) [Review of Maritime Transport 2022](#). The CMA is aware of forecasts predicting further declines in spot and contractual freight rates during 2023; WSC, ICS, ASA (2022). Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation, pp39-40; Charles River Associates (2022) *Liner shipping consortia: Assessment of freight rate developments prepared for World Shipping Council*.

<sup>59</sup> More broadly, see Andrea Coscelli's November 2021 [open letter](#) to Make UK and the British Chambers of Commerce.

<sup>60</sup> Charles River Associates (2022) *Liner shipping consortia: Assessment of freight rate developments prepared for World Shipping Council*, p25.

## **Block exemptions in other jurisdictions**

- 4.14 Many jurisdictions have some form of exemption from competition law for VSAs, including the European Union, Hong Kong and Singapore. Other jurisdictions, such as the United States and Australia, operate a notification/registration-style system for liner shipping agreements.<sup>61</sup> In 2021 to 2022, the Hong Kong Competition Commission and the Competition and Consumer Commission of Singapore renewed their relevant block exemptions for VSAs.<sup>62</sup> The European Commission is currently reviewing its own CBER, while the Malaysian Competition Commission also consulted last year on the renewal of its VSA block exemption.<sup>63</sup>
- 4.15 The CMA recognises the global nature of the liner shipping industry and that it is integral to the effective operation of global supply chains. As the liner shipping industry operates across jurisdictions, single trade routes may be subject to multiple competition regimes.
- 4.16 Due to its geographic positioning, UK ports are commonly stops on wider European services, meaning that businesses serving the UK must also comply with European legal frameworks, amongst others depending on the origin of the journey.
- 4.17 Several stakeholders have stated that an internationally consistent approach to the regulation of the liner shipping industry would be beneficial in providing legal certainty and reducing compliance costs across multi-jurisdictional trade routes.<sup>64</sup>
- 4.18 The CMA is mindful of the challenges faced by businesses serving the UK in navigating both European and UK competition law. Certain stakeholders have proposed that without an internationally consistent approach (particularly if the retained CBER was allowed to expire without replacement) liners may be deterred from making direct calls to UK ports in favour of serving the UK by way of transshipment to and from European ports.<sup>65</sup> This could have flow-on

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<sup>61</sup> The CMA notes that the US Department of Justice Antitrust Division has previously testified before Congress in favour of eliminating the exemption set out in the Shipping Act of 1984 and Ocean Shipping Reform Act (OSRA), and the Australian Competition and Consumer Commission had [begun work](#) on developing a possible class exemption for ocean carriers providing international liner cargo shipping services to and from Australia.

<sup>62</sup> See Hong Kong Competition Commission's [Block exemption order in relation to certain vessel sharing agreements](#); see Competition and Consumer Commission of Singapore's [Competition \(Block Exemption for Liner Shipping Agreements\) Order](#).

<sup>63</sup> EC (2022) [EU competition law – evaluation of the Consortia Block Exemption Regulation](#); MyCC (2022) [Proposed Renewal Of The Block Exemption For Vessel Sharing Agreements \(VSA\) In Respect Of Liner Shipping Services Through Transportation By Sea](#).

<sup>64</sup> Meeting with UK Chamber of Shipping and ICS; meeting with World Shipping Council; meeting with BIFA.

<sup>65</sup> Meeting with World Shipping Council; WSC, ICS, ASA (2022). *Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation*, p8, p14. Transshipment refers to the unloading of goods

effects to UK consumers as the costs associated with transshipment can impact the cost of goods.<sup>66</sup>

- 4.19 The CMA considers that businesses stopping at UK ports should not be put at a competitive disadvantage, and that subsequently UK consumers do not face higher prices for goods due to regulatory disharmony. Since other jurisdictions in the region continue to offer block exemptions for consortia agreements, the CMA sees value in aligning its approach to ensure the needs of UK businesses and consumers are served.

### **Legal certainty**

- 4.20 An important rationale for the retained CBER is that it provides businesses in the liner shipping industry with legal certainty to coordinate and offer joint services.
- 4.21 Organisations representing liners state that the retained CBER increases their agility and flexibility to amend and replace VSAs, thereby lowering compliance costs.<sup>67</sup>
- 4.22 Other stakeholders have proposed that greater legal certainty for all parties could be achieved through other mechanisms such as general antitrust provisions and/ or sector-specific regulation or guidance of some form.<sup>68</sup>
- 4.23 The CMA acknowledges that without the retained CBER, it is likely that firms in this sector would rely on general antitrust provisions or require some form of sector guidance. The CMA is provisionally of the view that general antitrust provisions would not support the goal of providing sufficient legal certainty to firms since the retained CBER enhances certainty by providing industry-specific terminology and provisions relevant to consortia. Similarly, although creating sector-specific guidance may provide greater clarity to firms relative to general antitrust provisions, it would not provide the same degree of legal certainty as the retained CBER.

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from one ship and their loading onto another to complete a journey to a further destination – the ports of Rotterdam and Gioia Tauro are major European transshipment ports.

<sup>66</sup> WSC, ICS, ASA (2022). *Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation*, p8, p14; more broadly, see Marco Fugazza and Jan Hoffmann (2017). “[Liner shipping connectivity as determinant of trade](#)” *Journal of Shipping and Trade* 2.1.

<sup>67</sup> WSC, ICS, ASA (2022). *Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation*, p34.

<sup>68</sup> Meeting with CLECAT, who maintain that the current CBER regime provides excessive scope for co-operation beyond that necessary for the operation of VSAs; meeting with Global Shippers Forum, who noted any alternate system should limit the scope for data exchange to that strictly necessary for the operations of VSAs.

## **Service quality and price**

- 4.24 The retained CBER aims to promote better capacity utilisation of vessels and economies of scale, which can have flow-on effects for consumers through increased choice and accessibility of goods, at lower prices.
- 4.25 The CMA has heard from certain stakeholders that while the price of services provided by liners increased significantly during the course of the pandemic, the quality of service has decreased.<sup>69</sup> Stakeholders attributed these to increased market concentration in the sector which they maintain has increased the bargaining power of liners, resulting in more limited and poorer quality services at higher prices.<sup>70</sup> Conversely, stakeholders representing liners emphasise that consortia members continue to compete vigorously on price and non-price aspects of their offerings, including customer service, administrative convenience and payment arrangements.<sup>71</sup>
- 4.26 Several stakeholders representing liners and forwarders noted that transshipment can negatively affect service quality and final prices, as well as contributing to increased greenhouse gas emissions.<sup>72</sup> The CMA notes that certain stakeholders have raised concerns that liners have reduced direct calls at UK ports, leading to more transshipment from Europe, thereby increasing emissions.<sup>73</sup> While certain stakeholders have attributed a decline in direct calls to the CBER regime,<sup>74</sup> bodies representing liners have (as noted at paragraph 4.18 above) made the case that the loss of the CBER regime would likely lead to increased transshipment to the UK due to regulatory divergence, with the attendant increase in transit times and final prices.<sup>75</sup>
- 4.27 The CMA acknowledges the ongoing disruptions caused by the COVID-19 pandemic and the impact this has had on the availability and price of goods. However, the CMA has not received sufficient evidence to substantiate concerns about the loss of competition and increase in prices as a direct result of the retained CBER, and notes that freight rates and other performance indicators appear to be returning to pre-pandemic levels.<sup>76</sup>

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<sup>69</sup> Meeting with Global Shippers Forum; meeting with CLECAT; although see also paragraph 3.9 above.

<sup>70</sup> Meeting with Global Shippers Forum; meeting with CLECAT.

<sup>71</sup> WSC, ICS, ASA (2022). *Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation*, pp21-22.

<sup>72</sup> Meeting with CLECAT, who suggest that connectivity has decreased in recent years, leading to increased transshipment; meeting with Anonymous 1; see also CLECAT submission to the EC's consultation; WSC, ICS, ASA (2022). *Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation*, p8, p14.

<sup>73</sup> See CLECAT submission to the EC's consultation.

<sup>74</sup> See CLECAT submission to the EC's consultation.

<sup>75</sup> WSC, ICS, ASA (2022). *Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation*, p8, p14.

<sup>76</sup> See also paragraph 3.9 above.

The CMA notes that a number of stakeholders who raised concerns with the retained CBER regime also acknowledged the efficiencies offered, in theory, by VSAs.<sup>77</sup>

### ***Recommendation***

4.28 For the reasons set out above, the CMA is minded to recommend that the Secretary of State make a block exemption order to replace the retained CBER. The CMA is provisionally of the view that the retained CBER remains a relevant and useful tool for businesses that increases legal certainty compared to a situation where businesses would have to rely solely on self-assessment. The CMA's provisional recommendations with regards to the specific articles of the retained CBER are set out further below.

### ***Policy question***

**Question 1:** Do you agree with the CMA's proposed recommendation to the Secretary of State to make a block exemption order to replace the retained CBER?

### ***Impact Questions***

**Question 2:** Relative to current arrangements, if the retained CBER were allowed to expire, how would the absence of legal certainty and clarity affect your business or those that you represent? Please describe the scale of any legal or expert advice needed (eg time spent with consultants).

**Question 3:** Please describe the business channels through which the retained CBER currently affects UK consumers. How would UK consumers be affected if the retained CBER were allowed to expire?

## **Changes to the scope or definitions in the retained CBER**

### ***Current regime***

4.29 The scope, definitions, and exempted agreements of the retained CBER are included in Articles 1, 2 and 3, respectively. These provisions set out key terms and activities permitted by the 'safe harbour' provided by the retained CBER.

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<sup>77</sup> Meeting with CLECAT, who noted that carriers are able to cooperate without the need for an exemption from general competition rules, guided in particular by the revised Guidelines on horizontal co-operation agreements – see also footnote 47 above; meeting with Global Shippers Forum; meeting with BIFA.

- 4.30 Article 1 of the retained CBER sets out that the block exemption applies to consortia only in so far as they provide international liner shipping services from or to one or more UK ports.
- 4.31 Article 2 of the retained CBER sets out a series of definitions for ‘consortium’,<sup>78</sup> ‘liner shipping’,<sup>79</sup> ‘transport user’,<sup>80</sup> and ‘commencement of service’.<sup>81</sup>
- 4.32 Article 3 of the retained CBER provides a ‘safe harbour’ for the following activities of a consortium:
- Article 3(1): the joint operation of liner shipping services;<sup>82</sup>
  - Article 3(2): capacity adjustments in response to fluctuations in supply and demand;
  - Article 3(3): the joint operation or use of port terminals and related services (such as lighterage or stevedoring services); and
  - Article 3(4): any other activity ancillary to those referred to in points (i), (ii) and (iii) which is necessary for their implementation.<sup>83</sup>

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<sup>78</sup> As per Article 2(1), ‘consortium’ means an agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements.

<sup>79</sup> As per Article 2(2), ‘liner shipping’ means the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an occasional basis, to any transport user against payment.

<sup>80</sup> As per Article 2(3), ‘transport user’ means any undertaking (such as shipper, consignee or forwarder) which has entered into, or intends to enter into, a contractual agreement with a consortium member for the shipment of goods.

<sup>81</sup> As per Article 2(4), ‘commencement of the service’ means the date on which the first vessel sails on the service.

<sup>82</sup> Article 3(1) of the retained CBER sets out that these include (a) 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.

<sup>83</sup> Article 3(4) of the retained CBER establishes that these ancillary activities could include (a) the use of a computerised data exchange system; (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.



- 4.33 This Review provides an opportunity to clarify the language of the proposed CBEO to ensure the interpretation of any CBEO is aligned with its intended objectives.
- 4.34 The CMA has heard from certain stakeholders that the scope of the retained CBER is poorly defined, and that the regulation contains various provisions and terms that are unclear and too open to interpretation.<sup>84</sup> Specifically, these stakeholders raised concerns that Article 3(4)(a) within the retained CBER that allows for ‘the use of a computerised data exchange system’ and the sharing of information related to permitted activities, is outdated.<sup>85</sup>
- 4.35 These stakeholders believe that information exchanged as part of consortia agreements may go further than necessary and is outside of the bounds of the retained CBER.<sup>86</sup>

### ***Recommendations***

- 4.36 The CMA is provisionally of the view that the scope and definitions used in the retained CBER, alongside the exempted agreements set out in Article 3, remain appropriate.
- 4.37 In relation to the provision concerning the use of a ‘computerised data exchange system,’ the CMA provisionally considers that, for the most part, the definition is clear but may need some updating to reflect technological developments. The CMA is therefore inviting views from stakeholders on how the definition should be modified in order to reflect such developments and provide additional clarity to relevant parties.

### ***Policy Question***

**Question 4:** Does the scope of the retained CBER, set out in Article 1, require modification or updating? Please provide the evidence and reasoning behind your answer.

**Question 5:** Do any of the definitions set out in Article 2 of the retained CBER require modification? Please provide the evidence and reasoning behind your answer.

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<sup>84</sup> Meeting with CLECAT – see paragraph 4.46 below; see also CLECAT submission to the EC’s consultation.

<sup>85</sup> See Global Shippers Forum submission to the EC’s consultation.

<sup>86</sup> Meeting with Global Shippers Forum – see paragraph 3.11 above; meeting with CLECAT.

**Question 6:** Does Article 3(4)(a) on the ‘use of a computerised data exchange system’ require updating? If so, how could further clarity be offered? Please provide the evidence and reasoning behind your answer.

**Question 7:** Do any other aspects of the exempted agreements set out in Article 3 of the retained CBER require updating? If so, which aspects need modification? Please provide the evidence and reasoning behind your answer.

## **Hardcore Restrictions**

### ***Current regime***

4.38 Consortia agreements which contain certain hardcore restrictions will not benefit from the ‘safe harbour’ set out in Article 3 of the retained CBER. Where an agreement includes a hardcore restriction that agreement is likely to fall within the scope of the Chapter I prohibition. In addition, a consortia agreement that includes a hardcore restriction is unlikely to fulfil the conditions for exemption from the Chapter I prohibition.

4.39 The hardcore restrictions set out in Article 4 of the retained CBER cover:

- a) The fixing of prices when selling liner shipping services to third parties;
- b) The limitation of capacity or sales except for the capacity adjustments referred to in Article 3(2) of the retained CBER;
- c) The allocation of markets or customers.

### ***Recommendation***

4.40 In initial engagement with stakeholders, the CMA has not received specific or significant concerns with the current range of hardcore restrictions contained in the retained CBER. The CMA is therefore proposing to recommend that the current list of hardcore restrictions in the retained CBER should be maintained.

### ***Policy questions***

**Question 8:** Do you agree with the CMA’s recommendation to retain the current hardcore restrictions in the retained CBER in any CBEO? If not, what are the reasons and evidence that would warrant a change to the current hardcore restrictions?

## ***Impact Questions***

**Question 9:** Would retaining the current hardcore restrictions in any future CBEO present any possible issues for your business or those that you represent? Please provide the evidence and reasoning behind your answer, such as the expected costs or benefits that would accompany the current hardcore restrictions being retained in any future CBEO.

**Question 10:** How would retaining the current hardcore restrictions in the proposed CBEO impact consumers?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

## **Market definition and market share thresholds**

### ***Current regime***

4.41 Article 5 of the retained CBER establishes that for a consortium agreement to benefit from the exemption set out in Article 3, the combined market share of the consortium members in the relevant market upon which the consortium operates shall not exceed 30%.<sup>87</sup> This combined market share is calculated by reference to the total volume of goods carried in freight tonnes or 20-foot equivalent units. If this market share threshold is exceeded, the retained CBER does not apply but the agreement may still benefit from individual exemption under section 9(1) of the Act.

4.42 In establishing the market share of an individual consortium member, all volumes carried by that member in the relevant market are considered regardless of whether they are carried within the consortium in question or outside (either on the member's own or third-party vessels, or within another consortium agreement to which the member is party to).<sup>88</sup>

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<sup>87</sup> See the CMA's Guidance on Market Definition (OFT 403, Market Definition). The CMA will also have regard to [the European Commission's Notice on the definition of relevant market, OJ C 372, 9 December 1997](#), which is a statement of the European Commission for the purpose of section 60A CA98.

<sup>88</sup> Article 5(2) of the retained CBER.

4.43 The exemption provided by the retained CBER continues to apply if the market share threshold is exceeded during any period of two consecutive calendar years by not more than one tenth and continues to apply for a period of six months following the end of the calendar year during which it was exceeded.<sup>89</sup> This period is extended to 12 months if the excess is due to the withdrawal from the market of a carrier which is not a member of the consortium.<sup>90</sup>

### **Recommendation**

4.44 For the reasons set out below, the CMA is proposing to recommend that the current market share threshold (30%) should be maintained.

4.45 For the purpose of the Review, the CMA is concerned with the level at which the threshold should be set. In initial meetings with stakeholders, the CMA did not receive proposals for possible alternative market share thresholds, either at higher or lower levels. Without strong evidence to depart from the current threshold, the CMA is minded to recommend the 30% threshold is maintained for any CBER.

4.46 The CMA is aware of concerns about the market share test. Some stakeholders suggest that given the apparent number of consortia agreements that exceed the current combined market threshold,<sup>91</sup> and given the difficulties in establishing market shares with certainty, the current market share provisions of the CBER regime are inadequate and do not contribute to legal certainty.<sup>92</sup> One stakeholder suggested that there is difficulty in estimating the exact market share of consortia due to the lack of accurate data on transported volumes, the concept of 'given trade lanes' and the complex network of cross-membership between consortia.<sup>93</sup>

4.47 These concerns are linked to a broader debate on the appropriateness of the use of prevailing market concentration measures (the Herfindahl–Hirschman Index, HHI) for the liner shipping industry. Certain stakeholders highlight research which puts forward an alternative model of measuring concentration

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<sup>89</sup> Articles 5(3) and 5(4) of the retained CBER.

<sup>90</sup> Article 5(4) of the retained CBER.

<sup>91</sup> Meeting with Global Shippers Forum and CLECAT.

<sup>92</sup> ITF (2019) "[Container Shipping in Europe: Data for the Evaluation of the EU Consortia Block Exemption](#)", pp8-10, p13, p38. The ITF report recommends using other indicators than volumes of goods to determine the threshold, such as the capacity of carriers/consortia on trade lanes. The CMA also notes that certain stakeholders have called for the market share threshold of the EC's equivalent CBER to be lowered. Previous reviews of the CBER regime have recognised that the lack of accurate public data with regards to actual transported volumes is a complicating factor in assessing market share values. See also EC 2019 SWD, p16, p20fn79.

<sup>93</sup> Meeting with CLECAT.

within the liner shipping industry, namely a modified Herfindahl–Hirschman Index (MHHI) that takes into account consortia and interlinkages between consortia.<sup>94</sup> These stakeholders maintain that these alternative models suggest that concentration in the market is underestimated and, more specifically, that the utility of the current market share threshold appears questionable given that there is, in their view, little discernible difference in behaviour between consortia that qualify in terms of market share for the exemption provided by the retained CBER and those that do not.<sup>95</sup>

- 4.48 In contrast, bodies representing liners suggest that the proposed MHHI is more typically used to consider common ownership and therefore does not accurately reflect the nature of consortia agreements, as members do not obtain stakes in each other, do not share in profits, and are not compensated for unused slots.<sup>96</sup> They note also that the market share provisions set out in Article 5(2)(b) already account for cross-consortia membership within the market share methodology.<sup>97</sup> While the previous EC review of the CBER regime established that there is ‘no doubt’ that the level of concentration in the liner shipping market has increased in recent years,<sup>98</sup> the market appears to have been relatively stable in terms of consolidation since 2020.<sup>99</sup>
- 4.49 The CMA notes that this wider discussion is focused primarily on the broader question of market concentration rather than the specifics of the market share threshold of Article 5 of the retained CBER. The evidence that the CMA has seen is not sufficient at this stage to conclude that an alternative market share threshold would be appropriate.
- 4.50 Some stakeholders have made the suggestion that the 30% market share threshold is routinely breached.<sup>100</sup> However, the CMA notes that self-assessment for individual exemption under section 9(1) of the Act should then apply in these circumstances, and that this does not in and of itself suggest that the current thresholds are inappropriate.

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<sup>94</sup> See Olaf Merk and Antonella Teodoro (2022). “[Alternative approaches to measuring concentration in liner shipping](#)”, *Maritime Economics & Logistics*, pp723–746.

<sup>95</sup> Meeting with Global Shippers Forum; see also Global Shippers Forum submission to the EC’s review and Merk and Teodoro (2022), “Alternative approaches”, p726.

<sup>96</sup> WSC, ICS, ASA (2022). Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation, p30.

<sup>97</sup> WSC, ICS, ASA (2022). Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation, p32.

<sup>98</sup> EC 2019 SWD (2019), p21.

<sup>99</sup> This is recognised by bodies representing shippers as well as liners. See, for example, the Global Shippers Forum’s submission to the EC’s consultation, p15; WSC, ICS, ASA (2022). Submission to CMA Evaluation of Retained Liner Shipping Consortia Block Exemption Regulation, pp28-29.

<sup>100</sup> Meeting with CLECAT; meeting with Global Shippers Forum.

4.51 For the reasons set out above, the CMA considers that the current market share threshold remains appropriate and is not minded to recommend changes to it.

### ***Policy Questions***

**Question 11:** Do you agree with the CMA's proposed recommendation to retain the current market share threshold in the proposed CBEO? If not, what are the reasons and evidence that warrant a change to the market share threshold in the proposed CBEO?

**Question 12:** Separate to the 30% threshold, do the other conditions relating to market share set out in Article 5 remain appropriate and useful? If not, which aspects need modification? Are there any other changes that you consider should be made?

### ***Impact Questions***

**Question 13:** What would be the likely impact on your business's operations or the operations of those you represent if the market share threshold were increased?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 14:** What would be the likely impact on your business's operations or the operations of those you represent if the market share threshold were decreased?

- f) Significant positive impact
- g) Moderate positive impact
- h) Negligible impact
- i) Moderate negative impact
- j) Significant negative impact

## Other Provisions

### *Current regime*

- 4.52 Article 6 of the retained CBER sets out that to qualify for exemption, any consortium agreement must give members the right to withdraw without financial or other penalties. This right to withdraw may, however, be subject to stipulations that such notice can only be given after an initial period of a maximum of 24 months starting from the date of entry into force of the agreement or, if later, from the commencement of the service.
- 4.53 This period of notice may be extended to 12 months in the case of a highly integrated consortium, and the consortium may stipulate that such notice can only be given after an initial period of a maximum of 36 months starting from the date of entry into force of the agreement or, if later, from the commencement of the service. This longer notice period takes account of the higher investments undertaken to establish these highly integrated consortia, and the more extensive reorganisation entailed in the event of a member leaving.<sup>101</sup>

### *Recommendation*

- 4.54 The CMA has not received substantial stakeholder feedback at this stage with regards to Article 6 of the retained CBER. As such, the CMA is proposing to recommend that the existing provisions of Article 6 be maintained in any CBEO.

### *Policy Question*

**Question 15:** Do you agree with the CMA's proposed recommendation that the current provisions of Article 6 of the retained CBER be maintained in any future CBEO? If not, what are the reasons and evidence that would warrant a change to these provisions?

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<sup>101</sup> Retained CBER, recital 11.

## 5. Duration of the retained CBER

- 5.1 The retained CBER has a duration of four years and is due to expire on 25 April 2024.
- 5.2 This four-year duration, as compared to the previous five-year duration of the CBER, was justified on the grounds of allowing a swift response to possible changes in market circumstances. As has been outlined in Section 3, evidence reviewed by the CMA and initial engagement with stakeholders suggests that the market is still in a state of recovery from the COVID-19 pandemic and that it would be premature to forecast the state of the market for the near future. Given the global nature of the liner shipping industry, there is also the question of any UK CBEO differing significantly from equivalent regulations in other relevant jurisdictions to the detriment of businesses in the maritime logistics sector in the UK which operate in international markets.
- 5.3 Section 6(7) of the Act sets out that a block exemption order may provide that the order is to cease to have effect at the end of a specified period. It is clear that there is no obligation to provide an expiry date for an order. At this stage, the CMA is provisionally minded to recommend a CBEO without a fixed duration. The CMA, however, invites any views from interested stakeholders in relation to this point.
- 5.4 The CMA is of the view that any CBEO will need to be a fit-for-purpose tool for a post-pandemic market and, as far as possible, coherent with equivalent regulations that are in place in nearby jurisdictions given the UK's integration within wider European trade routes. A CBEO without a fixed duration would allow the CMA to carry out a review of the block exemption at an early stage if market circumstances or the wider international regulatory landscape changed significantly. Moreover, the CMA's provisional view is that it would be appropriate to review any CBEO at a point at which the impacts of recent exogenous shocks to the market are clearer, rather than committing to a fixed timetable created by a set expiry date. In any case, there is a statutory requirement to carry out and publish a post-implementation review of any block exemption order within five years of it coming into force and then regularly on a five-year cycle.<sup>102</sup>
- 5.5 A possible alternative to a CBEO without a set expiry date would be a block exemption order with a fixed expiry date that is shorter than the previous four- and five-year durations. The CMA is provisionally of the view that such an approach would not offer the same level of flexibility in allowing the CMA to

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<sup>102</sup> [Small Business, Enterprise and Employment Act 2015, section 28.](#)



react swiftly to emerging issues and may commit the CMA to a review at a point at which post-pandemic market trends are still uncertain. For this reason, the CMA is provisionally of the view that a CBEO without a set expiry date would be the most appropriate option.

### ***Policy Question***

**Question 16:** The CMA invites views from interested stakeholders on the possibility of a CBEO without a fixed expiry date.

### ***Impact Questions***

**Question 17:** What would be the likely impact on your business's operations or the operations of those you represent if any CBEO was not to include a fixed expiry date?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 18:** Please provide a short explanation highlighting your reasoning for your answer above.

## 6. Other Provisions

- 6.1 The CMA considers that any CBEO should provide for a transitional period of one year. This means that the Chapter I prohibition would not apply during a period of one year from the date on which the CBEO comes into effect in respect of agreements already in force on that date which (i) do not satisfy the conditions for exemption provided for in any CBEO, but (ii) on that date, satisfied the conditions for exemption provided for in the retained CBER.<sup>103</sup> In other words, existing agreements that meet the conditions of the retained CBER could continue to benefit from its terms for a year after its expiry, whereas agreements entered into after its expiry would need to meet the conditions of the new UK CBEO to benefit from the block exemptions.
- 6.2 The CMA is therefore proposing to recommend that any CBEO have a transitional period of one year to allow businesses that wish to take advantage of the ‘safe harbour’ to review and (if necessary) revise their agreements.

### Cancellation in individual cases

- 6.3 Section 6(6)(c) of the Act provides that a block exemption order may provide that if the CMA considers that a particular agreement is not an exempt agreement,<sup>104</sup> it may cancel the block exemption in respect of that agreement. The CMA proposes that any future CBEO should contain such a provision. The CMA proposes that any cancellation, ie withdrawal of the benefit of the CBEO in an individual case, should be in writing, and that the CMA should first give notice in writing of its proposal and consider any representations made to it before making a decision to cancel the block exemption in respect of that agreement. The CMA proposes that any notice should state the facts on which the CMA bases its decision or proposal and its reasons for making it. The CMA envisages that these provisions would be similar to those in the Vertical Agreements Block Exemption Order 2022 and the Research and Development and Specialisation Block Exemption Orders 2022.<sup>105</sup>
- 6.4 The CMA is therefore minded to recommend that any CBEO provides for the CMA to cancel the benefit of the block exemption in individual cases to ensure that the ‘safe harbour’ is only available for those agreements that satisfy the

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<sup>103</sup> Unless the benefit of the block exemption is cancelled, or otherwise varied or revoked, in accordance with the provisions of the CBEO or the Act.

<sup>104</sup> Exempt agreement means an agreement which is exempt from the Chapter I prohibition as a result of section 9 of the Act (the Act, section 6(8)).

<sup>105</sup> See [Competition Act 1998 \(Vertical Agreements Block Exemption\) Order 2022](#); [Competition Act 1998 \(Research and Development Agreements Block Exemption\) Order 2022](#); [Competition Act 1998 \(Specialisation Agreements Block Exemption\) Order 2022](#).

conditions for exemption under section 9 of the Act. The CMA considers that this provision is likely only to be used in exceptional circumstances and that the proposal to provide notice in writing and to consider any representations would ensure that the provision was used appropriately.

## Obligation to provide information

- 6.5 Section 6(5) of the Act provides that a block exemption order may impose obligations subject to which a block exemption is to have effect and section 6(6)(b) of the Act provides that a block exemption order may provide that if there is a failure to comply with an obligation imposed by the order, the CMA may, by notice in writing, cancel the block exemption in respect of the agreement. The CMA proposes that any CBEO should impose an obligation for parties to provide the CMA with information in connection with those agreements within the scope of any CBEO to which they are a party if requested to do so and that failure to do so without reasonable excuse should result in cancellation, ie withdrawal, of the block exemption.
- 6.6 The CMA proposes that the obligation should be for businesses to supply the CMA with such information in connection with those relevant agreements to which they are a party. The CMA may require this information within ten working days from the date on which the party receives notice in writing of the request or within an extended period of working days which the CMA may agree to in writing. The CMA also considers that if it proposes to cancel the block exemption, it should first give notice in writing of its proposal and consider any representations made to it. The CMA envisages that these provisions would be similar to those in the Vertical Agreements Block Exemption Order 2022 and the Research and Development and Specialisation Block Exemption Orders 2022.<sup>106</sup>
- 6.7 The CMA is therefore proposing to recommend that any CBEO include an obligation to provide information to the CMA so that it may assess whether an agreement that benefits from the block exemption is one that satisfies the conditions for exemption under section 9 of the Act. This provision would also enable the CMA to investigate instances where competition law concerns arise from parallel networks of similar restraints.<sup>107</sup>

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<sup>106</sup> See [Competition Act 1998 \(Vertical Agreements Block Exemption\) Order 2022](#); [Competition Act 1998 \(Research and Development Agreements Block Exemption\) Order 2022](#); [Competition Act 1998 \(Specialisation Agreements Block Exemption\) Order 2022](#).

<sup>107</sup> The process for providing representations where a response contains commercially sensitive information or details of an individual's private affairs and the sender considers that disclosure might significantly harm their interests or the interests of the individual, is explained in Chapter 7 of the [Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8](#).

***Policy question***

**Question 19:** The CMA invites views on the above proposed recommendations in respect of the other provisions in any CBEO.

## **Annex: Consultation Questions**

### **General recommendation**

#### ***Policy question***

**Question 1:** Do you agree with the CMA's proposed recommendation to the Secretary of State to make a block exemption order to replace the retained CBER?

#### ***Impact Questions***

**Question 2:** Relative to current arrangements, if the retained CBER were allowed to expire, how would the absence of legal certainty and clarity affect your business or those that you represent? Please describe the scale of any legal or expert advice needed (eg time spent with consultants).

**Question 3:** Please describe the business channels through which the retained CBER currently affects UK consumers. How would UK consumers be affected if the retained CBER were allowed to expire?

### **Changes to the scope or definitions in the retained CBER**

#### ***Policy Question***

**Question 4:** Does the scope of the retained CBER, set out in Article 1, require modification or updating? Please provide the evidence and reasoning behind your answer.

**Question 5:** Do any of the definitions set out in Article 2 of the retained CBER require modification? Please provide the evidence and reasoning behind your answer.

**Question 6:** Does Article 3(4)(a) on the 'use of a computerised data exchange system' require updating? If so, how could further clarity be offered? Please provide the evidence and reasoning behind your answer.

**Question 7:** Do any other aspects of the exempted agreements set out in Article 3 of the retained CBER require updating? If so, which aspects need modification? Please provide the evidence and reasoning behind your answer.

## Hardcore Restrictions

### *Policy questions*

**Question 8:** Do you agree with the CMA's recommendation to retain the current hardcore restrictions in the retained CBER in any CBEO? If not, what are the reasons and evidence that would warrant a change to the current hardcore restrictions?

### *Impact Questions*

**Question 9:** Would retaining the current hardcore restrictions in any future CBEO present any possible issues for your business or those that you represent? Please provide the evidence and reasoning behind your answer, such as the expected costs or benefits that would accompany the current hardcore restrictions being retained in any future CBEO.

**Question 10:** How would retaining the current hardcore restrictions in the proposed CBEO impact consumers?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

## Market definition and market share thresholds

### *Policy Questions*

**Question 11:** Do you agree with the CMA's proposed recommendation to retain the current market share threshold in the proposed CBEO? If not, what are the reasons and evidence that warrant a change to the market share threshold in the proposed CBEO?

**Question 12:** Separate to the 30% threshold, do the other conditions relating to market share set out in Article 5 remain appropriate and useful? If not, which aspects need modification? Are there any other changes that you consider should be made?

## ***Impact Questions***

**Question 13:** What would be the likely impact on your business's operations or the operations of those you represent if the market share threshold was increased?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 14:** What would be the likely impact on your business's operations or the operations of those you represent if the market share threshold was decreased?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

## **Other Provisions**

### ***Policy Question***

**Question 15:** Do you agree with the CMA's proposed recommendation that the current provisions of Article 6 of the retained CBER be maintained in any future CBEO? If not, what are the reasons and evidence that would warrant a change to these provisions?

## **Duration of the retained CBER**

### ***Policy Question***

**Question 16:** The CMA invites views from interested stakeholders on the possibility of a CBEO without a fixed expiry date.

## ***Impact Questions***

**Question 17:** What would be the likely impact on your business's operations or the operations of those you represent if any CBEO was not to include a fixed expiry date?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 18:** Please provide a short explanation highlighting your reasoning for your answer above.

## **Other Provisions**

### ***Policy question***

**Question 19:** The CMA invites views on the above proposed recommendations in respect of the other provisions in any CBEO.