

## **. Response to the Liner Shipping Consortia Block Exemption Regulation Consultation Document**

**22 February 2023**

### **1. INTRODUCTION**

- 1.1 The British International Freight Association (“**BIFA**”) welcomes the opportunity to respond to the Competition and Markets Authority’s (“**CMA**”) consultation on the Retained Liner Shipping Consortia Block Exemption Regulation (“**CBER**” and “**CBER Consultation Document**”) dated 19 January 2023.
- 1.2 BIFA is the prime trade association for UK-registered companies engaged in the international movement of freight by all modes of transport, air, road, rail and sea, and/or customs brokerage. BIFA has over 1600 members in the logistics and supply chain sector, known generally as freight forwarders, who offer a wide range of services within these various modes (“**BIFA Members**”).
- 1.3 BIFA Members are organisations engaged in the movement of freight to and from the UK by all modes of transport: air, road, sea, and rail. Some Members also provide customs clearance and other cross-border services.
- 1.4 BIFA met with the CMA on 6 October 2022 and raised a number of points reflected in its response below. Some of these points were included in the CBER Consultation Document. A general concern that BIFA has is whether the CMA truly understands the issues BIFA has raised, the liner shipping market overall, and whether it has appropriately considered how to deal with the issues raised by BIFA’s Members. This is explained in more detail below. BIFA also gleaned responses from its Members in respect of the CBER Consultation Document, which are reflected in the response below.
- 1.5 In this document, BIFA sets out: (i) a general background to the industry, its overall views on the CBER and on general points raised by the CMA, and (ii) its response to the CMAs targeted questionnaire.

### **2. EXECUTIVE SUMMARY**

- 2.1 On 19 January 2023 the CMA published for consultation its proposed CBER recommendations to the Secretary of State. The CBER is set to expire on 25 April 2024.
- 2.2 As a general observation, BIFA is concerned that the CMA is not taking into account all relevant factors as part of its consultation. To that end, BIFA considers the CMAs Consultation Questions are too limited in scope and applicability and, therefore, BIFA has commented on the following issues;
  - 2.2.1 General comments on the status of the industry;
  - 2.2.2 Views of shipping liners and consortia are given more weight than views of freight forwarders and other members of the supply chain.
  - 2.2.3 Surcharges and fees.

- 2.2.4 Market disruptions during the Covid-19 pandemic;
  - 2.2.5 Vertical concerns.
  - 2.2.6 Data sharing concerns;
  - 2.2.7 Digitisation; and
  - 2.2.8 Whether alliances and consortia help environmental standards.
- 2.3 Below BIFA has also provided its response to the Targeted Questionnaire, taking into account its comments made more generally.

### **3. BACKGROUND AND GENERAL POINTS ON CBER**

#### *3.1 General comments on the status of the industry*

- 3.1.1 As a general observation, the CMAs Consultation Questions are too limited in scope and applicability. Therefore, BIFA has set out below background and commentary on the overall CBER Consultation Document.
- 3.1.2 As discussed in BIFA's meeting with the CMA on 6 October 2022 (the "**Meeting**") there have been long-existing tensions within the sector. The shipping liner sector is a multi-layered industry with a complex structure. It is important for the CMA to understand and take into consideration the views of each player within the sector, and to take a holistic approach in considering the impact of the CBER on all players.
- 3.1.3 BIFA agrees with the CMA in paragraph 2.6 of the CBER Consultation Document that there are certain aspects of the retained CBER that would need to be revised or updated. While BIFA Members generally agree that the CBER does mostly result in more legal certainty, there are, conversely, certain aspects of the CBER that need to be revisited given the industry dynamics. These are discussed below.
- 3.1.4 As indicated by the CMA in section 3 of the CBER Consultation Document, efficiencies experienced by consortia and other parties within the maritime logistics sector "*...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'*". However, this does not address the impact of the CBER on the shipping liner sector more generally, including on other relevant participants in the wider liner shipping supply chain. BIFA, therefore, considers that the CMA needs to discharge its duties by sufficiently investigating the impact of the CBER and the shipping liner sector more holistically as part of its review of the CBER. BIFA considers it a primary responsibility of the market regulator to establish the trends and patterns of behaviour independently and accurately in the market under review and hence the efficacy of its own Block Exemption instrument. In view of the protections afforded to them by the CBER, it is mainly the responsibility of the shipping liners to provide the CMA with all relevant information and for the CMA to robustly challenge any assertions. To be clear, BIFA and its Members are not anti-shipping liner. Rather, BIFA needs

to ensure that there is a suitable balance between carriers and BIFA Members, as customers of carriers and shipping liners.<sup>1</sup>

- 3.1.5 As will be discussed in more detail below, over the years BIFA and its Members have seen more vertical integration within the shipping liner industry with, for example, shipping liners creating their own freight forwarding arms of their business. This has had a major impact on the functioning of the sector and also on the key issue of data sharing. This development is an important aspect for the CMA to take into consideration as part of its holistic assessment.<sup>2</sup>
- 3.1.6 For instance, has the CMA properly investigated as part of its review whether liners are genuinely using consortia to manage the capacity supply and demand, or whether liners are in fact working together to drive up or protect rates?<sup>3</sup>
- 3.1.7 BIFA does not agree with the general assertions made in paragraph 3.3 of the CBER Consultation Document. While consortia agreements do in certain instances improve *productivity*, BIFA Members do not agree that they improve the quality of services, particularly in terms of schedule reliability or customer service. Consortia agreements between shipping liners generate efficiencies that benefit customers and consumers only if there is sufficient competition in the markets in which the consortia operate. This is no longer the case today. As a result of various changes in the industry, consortia cannot be said to facilitate economically efficient cooperation that also benefits consumers of shipping services through lower prices and better-quality services.<sup>4</sup>
- 3.1.8 In terms of the CBER, carriers are permitted to match demand and supply. [x]<sup>5</sup>

### 3.2 *Views of shipping liners and consortia are given more weight than views of freight forwarders and other members of the supply chain*

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<sup>1</sup> The terms ‘carrier’ and ‘shipping liner’ have been used interchangeably in this document.

<sup>2</sup> See paragraphs 3.5 and 3.6.

<sup>3</sup> For example, see the multiple articles written on the subject (<https://theloadstar.com/disruption-and-high-freight-rates-created-by-competition-authorities-says-itf/>, <https://lloydlist.maritimeintelligence.informa.com/LL1139805/Maersk-scales-back-cargo-accepted-from-forwarders>) and the submission of CLECAT to the European Commission ([https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation/F3347063\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation/F3347063_en)).

<sup>4</sup> For example, <https://www.lloydloadinglist.com/freight-directory/news/ESC-and-Clecat-demand-change-to-failing-ocean-freight-market/77963.htm#.Y-9VxWnP02w> and the submission of CLECAT to the European Commission, ([https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation/F3347063\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation/F3347063_en)). Additionally, rising freight rates have been responsible for 1.6% of inflation globally, see <https://lloydlist.maritimeintelligence.informa.com/LL1141300/High-container-freight-rates-showing-in-inflation-figures> and <https://www.imf.org/en/Publications/WP/Issues/2022/03/25/Shipping-Costs-and-Inflation-515144>.

<sup>5</sup> [x]

- 3.2.1 It is the view of BIFA that the CMA's Consultation Document does not take the views of freight forwarders, associations, and other members of the supply chain into proper consideration.<sup>6</sup>
- 3.2.2 While the CBER has a focus on the relationship between consortia and members of consortia, regard must be had to the impact that the CBER has on all relevant relationships in the supply chains within which the consortia and consortia members operate.

### 3.3 *Surcharges and fees*

- 3.3.1 BIFA Members' concerns do not only relate to the financial impact of consortia agreements but also the impact of consortia agreements on service levels, surcharges and quay rent/demurrage fees, which in turn impact BIFA's Members.
- 3.3.2 Given the benefits shipping liners enjoy under the CBER (and its potential replacement), any charges levied by shipping liners (such as demurrage, detention and dredging charges) should be proportionate and fair, in the interests of ensuring a level playing field for the fluidity of international trade. Small and medium-sized enterprises are unable to effectively compete with the vertically integrated arms of shipping liners, and are ultimately being harmed due to these additional charges.<sup>7</sup>
- 3.3.3 [x].<sup>8</sup>

### 3.4 *Market disruptions during the Covid-19 pandemic*

- 3.4.1 As mentioned in the BIFA Meeting, during the pandemic the rates charged by shipping liners skyrocketed.<sup>9</sup> There were, however, numerous reports of record profits by shipping liners during this time, whereas smaller and medium-sized freight forwarders were facing financial struggles.<sup>10</sup> BIFA has been told by its Members numerous times that the pandemic exacerbated the negative consequences of the consortia agreements exempted by the CBER, allowing the carriers to reduce and deteriorate their services and hike prices to unprecedented levels.
- 3.4.2 During the pandemic, the shipping liner sector also saw increased vertical integration, with many shipping liners expanding into other areas of the supply chain. In respect of freight forwarding, BIFA's Members have told

<sup>6</sup> For example, see the CBER Consultation Document at paragraph 3.11 and paragraph 4.27.

<sup>7</sup> For example, [https://www.lloydsloadinglist.com/freight-directory/news/Demurrage-and-detention-charges-double-in-a-year/79387.htm#.Y-5\\_82nP02w](https://www.lloydsloadinglist.com/freight-directory/news/Demurrage-and-detention-charges-double-in-a-year/79387.htm#.Y-5_82nP02w) and <https://www.freightwaves.com/news/collusion-drumbeat-leads-to-multilateral-probe-of-shipping-lines>.

<sup>8</sup> [x].

<sup>9</sup> For example, [https://www.lloydsloadinglist.com/freight-directory/news/Shipper-competition-driving-up-ocean-freight-rates/79469.htm#.Y-5\\_q2nP02w](https://www.lloydsloadinglist.com/freight-directory/news/Shipper-competition-driving-up-ocean-freight-rates/79469.htm#.Y-5_q2nP02w), <https://www.lloydsloadinglist.com/freight-directory/news/Ex-Asia-long-term-ocean-freight-rates-rise-by-30/77507.htm#.Y-9VTmnP02w>,

<sup>10</sup> For example, <https://www.lloydsloadinglist.com/freight-directory/adviceandinsight/Spiralling-shipping-costs-threaten-survival-of-small-businesses/79896.htm#.Y-5-dmnP02w> and <https://lloydslist.maritimeintelligence.informa.com/LL1137148/Rates-crisis-favours-larger-shippers>.

BIFA that this has resulted in shipping liners withdrawing contract rates<sup>11</sup> with freight forwarders and putting freight forwarders onto a spot rate.<sup>12</sup> This issue was raised by BIFA at the Meeting. BIFA Members are of the view that the pandemic and the high demand and freight rates during the pandemic have provided shipping liners with the funding required in order to vertically integrate.

- 3.4.3 BIFA notes that the CMA did not conclude on this point in its CBER Consultation Document, but merely noted it as a point raised by freight forwarders. It urges the CMA to request information from the shipping liners to this end as part of its review.
- 3.4.4 BIFAs Members told it that the pandemic highlighted and accelerated this vertical consolidation of shipping liners and contributed to lower service levels and inflated rates, with carriers allocating vessels to the most profitable routes.<sup>13</sup> Carriers have manipulated tight capacity during the pandemic using deferred and cancelled sailings (amongst other things), to drive rates up.
- 3.4.5 BIFA requests that the CMA take these wider issues into greater consideration when looking at the impact of the CBER on the shipping liner sector holistically. Even though such concerns may, on the one hand, look to increase competition within the market for freight forwarding, the issue is that freight forwarders do not have vertically integrated systems where costs can be allocated throughout the supply chain to fund a particular part of the business so as to be equally competitive. By being able to enter into consortia agreements, shipping liners are effectively able to protect their core business and then use this to their advantage in other parts of their business, which freight forwarders simply cannot compete with. As such, there is no level playing field.<sup>14</sup>
- 3.4.6 BIFA recognises that supplying sufficient evidence to convince the CMA in respect of the effects of the pandemic on the market will be difficult given the nature of the industry and the real concerns of its Members of retaliation. However, regardless of the outcome of the consultation, BIFA considers it imperative that the CMA robustly continues to monitor trends in the liner shipping industry to inform its final recommendation as well as future reviews of the proposed CBER,<sup>15</sup> though this should be an ongoing obligation.<sup>16</sup> Certain aspects of the market may be of less concern to BIFA Members at present, but the market has shown to evolve quickly and therefore is not static, so requires careful monitoring. These issues are pertinent to the CBER given the benefits it confers on liner shipping

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<sup>11</sup> A contract rate is the rate that a carrier, freight broker or logistics service provider agrees to use when moving a shipper's freight for a set lane and its freight characteristics over a set period of time.

<sup>12</sup> A spot freight rate is the price a freight service provider offers a shipper at a point in time to move their product from point A to point B.

<sup>13</sup> For example, <https://www.freightwaves.com/news/collusion-drumbeat-leads-to-multilateral-probe-of-shipping-lines>.

<sup>14</sup> See paragraph 3.5 and 3.6.

<sup>15</sup> As per para 4.13 of the CMA's Consultation Document.

<sup>16</sup> See paragraph 4.1.6.

companies, which thereby impact their decision-making in relation to their overall businesses.

3.4.7 While BIFA understands that some issues experienced during the pandemic were outside of the shipping liner sector’s control, certain issues could have been handled better by carriers. These include the following:

3.4.7.1 The inability to correctly manage capacity balancing supply and demand.

3.4.7.2 There were reports in published articles of freight being “rolled” as liners elected to ship the most profitable freight movements.<sup>17</sup>

3.4.7.3 The management of the carriers’ relationships with port operators to ensure that ships at berth were “turned around” efficiently.

3.4.7.4 The mismanagement of the return of empty containers to their origin; and

3.4.7.5 Poor administration during the pandemic led to delays in document processing and securing cargo release. Any resulting costs generally had to be paid by the consignee.

3.4.8 It should be noted that BIFA does not agree with the statement made in paragraph 3.1 of the CBER Consultation Document regarding the CBER resulting in cost savings and efficiencies. As the container market is price sensitive, when there is strong consumer demand (as there was during the pandemic) shipping costs escalate very quickly, with very high profit -levels being reported. The increase in shipping costs will ultimately impact end consumers negatively. On the other end, when the market declines, BIFA Members have noticed that in order to protect themselves, carriers will adjust capacity, which usually results in an increase in pricing.<sup>18</sup>

### 3.5 *Vertical concerns*

3.5.1 BIFA disagrees with the statement made in paragraph 3.11 of the CBER Consultation document regarding the CBER not being the correct policy tool to account for any issues related to vertical integration.

3.5.2 An issue that has been raised by a number of stakeholders in the EU and the UK is the fact that vertical integration creates incentives for carriers to favour their own downstream activities at the expense of other freight forwarders, port services providers, or logistics operators.<sup>19</sup> [x]<sup>20</sup> The termination of

<sup>17</sup> For example, <https://www.lloydslisting.com/freight-directory/news/Cargo-rollovers-rose-at-most-major-box-ports-in-December/78316.htm#.Y-9Z3mnP02w>.

<sup>18</sup> For example, <https://theloadstar.com/disruption-and-high-freight-rates-created-by-competition-authorities-says-itf/>.

<sup>19</sup> For example, <https://lloydslisting.maritimeintelligence.informa.com/LL1139805/Maersk-scales-back-cargo-accepted-from-forwarders>.

<sup>20</sup> BIFA’s Members have told us that during the process of the shipping liners vertically integrating, BIFA Members have been “cut out of the equation”. This occurred by carriers contacting freight forwarders and indicating that Redfern House, Browells Lane, Feltham, Middlesex TW13 7EP United Kingdom  
T: +44 (0)20 8844 2266 E: [bifa@bifa.org](mailto:bifa@bifa.org) W: [bifa.org](http://bifa.org)



contracts with freight forwarders is normally due to shipping liners' favouring their vertically integrated freight forwarders, or favouring large shippers or consignees with whom they or their parent have direct contract rates.

- 3.5.3 CLECAT members have frequently reported on carriers' refusal to book a container port to port unless haulage services are included.
- 3.5.4 As discussed in the Meeting and as raised in the CBER Consultation Document, small and medium forwarders are impacted by liners withdrawing contract rates and replacing these with the more expensive spot rates.<sup>21</sup> This can specifically be seen in cases where shipping liners have vertically integrated their supply chains, and award their vertical supply chains the contract rates, while withdrawing contract rates from third-party freight forwarders and awarding them with less favourable spot rates.<sup>22</sup> Although noted by the CMA in the CBER Consultation Document, it has far-reaching repercussions for the ultimate consumers as this would increase prices paid and would reduce choice by the ultimate consumers. The ability of large shipping liners to essentially force smaller and medium freight forwarders into accepting spot rates is a result of these liners leveraging their position within the market.
- 3.5.5 BIFA considers that by reducing or withdrawing contract rates, shipping liners thereby reduce capacity of containers because shipping liners are affording their freight-forwarding arms contract rates that include a certain amount of capacity of containers, that had previously been allocated to independent freight forwarders. This means freight forwarders' access to the market is reduced. Freight forwarders do not make much profit on full container work. Freight forwarders benefit from there being many different consignors and consignees which is the basis of their groupage services. Whereas large shipping liners are able, where they have an excess space and cannot fit all items into one container, to place orders and ask other shipping liners to ship their excess items on their behalf.
- 3.5.6 As part of the consultation process, BIFA request that the CMA examine the impact that this would have, especially on the more vulnerable stakeholders within the shipping liner sector supply chain.

### 3.6 *Data sharing concerns*

- 3.6.1 BIFA raised its concerns around Data sharing at the Meeting. Additionally, stakeholders have made similar statements in the CMA Consultation Document<sup>23</sup>. While there are circumstances where shipping liners and consortia may exchange information legitimately, there is a general understanding within the industry that information exchanged as part of consortia agreements may go further than is necessary and, moreover, pertains to commercially sensitive information. This is a potentially serious

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they would be reducing or cutting out the relevant contract rate and putting the freight forwarder on a spot rate.

[X]

<sup>21</sup> See paragraph 3.4.2 above.

<sup>22</sup> For example, <https://theloadstar.com/maersk-looks-set-to-cut-out-freight-forwarders-to-attract-larger-bcos/>.

<sup>23</sup> See paragraph 4.11 of the CBER Consultation Document.

issue and BIFA urges the CMA to consider the risks of this as part of its review.<sup>24</sup>

- 3.6.2 Developments in data sharing such as AI, big data and analytics are also factors for consideration.
- 3.6.3 Clearly, any information shared between consortia members should be limited to the specified data elements considered necessary for the efficient operation of vessel-sharing consortium agreements.
- 3.6.4 Considering the data sharing concerns raised below, BIFA is of the view that there needs to be strict data neutrality regarding shipping liners acting beyond their traditional role. We propose that the CMA keep this under review and monitors data-sharing within the shipping liner sector regularly. As part of its regular audits as proposed in paragraph 4.1.6, BIFA will advise its Members to contact the CMA's cartel hotline or lodge a complaint should they have serious concerns. Though this alone is not sufficient. As part of such auditing process, is for the CMA to meet with industry bodies every 4 to 6 years to specifically deal with this point.

#### Horizontal

- 3.6.5 As has been noted in submissions of other stakeholders on the CBER to the European Commission, the development of platforms used by major shipping liners to cooperate on the provision of data allows for the exchange of information on supply chain events and documents on a dedicated platform.<sup>25</sup> It can be argued that the development of these platforms and standards has resulted in an exchange of data between carriers that goes far beyond what is permitted under competition law.

#### Vertical

- 3.6.6 [x]
- 3.6.7 [x]<sup>26</sup> [x]
- 3.6.8 [x]<sup>27</sup>
- 3.6.9 [x]
- 3.6.10 [x]

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<sup>24</sup> For example, <https://www.freightwaves.com/news/collusion-drumbeat-leads-to-multilateral-probe-of-shipping-lines>.

<sup>25</sup> See the submission of CLECAT to the European Commission, ([https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation/F3347063\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation/F3347063_en).)

<sup>26</sup> [x]

<sup>27</sup> [x]



### Digitisation

- 3.6.11 Nowadays, carriers exchange data via business intelligence and analytics platforms such as TradeLens. The TradeLens agreement (which is signed by major shipping lines) authorises the parties to cooperate with respect to the provision of data to a global trade digitalised solution that allows for the exchange of information on supply chain events and documents on a dedicated platform.
- 3.6.12 To enable the seamless exchange of data, carriers have set up the Digital Container Shipping Association (“DCSA”) whose aim is to develop IT standards dedicated for the use and storage of data in the international shipping supply chain. When using the TradeLens cloud service, carriers are required to use exclusively the DCSA IT standards.<sup>28</sup>
- 3.6.13 BIFA agrees with CLECAT that the development of these platforms and standards have resulted in an exchange of data between carriers that goes far beyond what permitted under competition law.<sup>29</sup>
- 3.6.14 This situation requires the development of clear guidance and potentially urgent enforcement activities by the CMA.

### 3.7 *Whether alliances and consortia help environmental standards*

- 3.7.1 Paragraph 4.5 of the CMAs Consultation Document states that *“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.”*
- 3.7.2 BIFA is strongly of the view given its and its Members experience, that consortia arrangements and alliances are entered into for purely commercial reasons, to maximise vessel utilisation and profitability and minimise costs. Any benefits (specifically, environmental benefits) that arise from consortia agreements are merely a useful ‘by-product’ of these alliances and consortia agreements, not because that was the intention.

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<sup>28</sup> BIFA understands that there is a bill currently moving through Parliament to facilitate e-bills and other e-documents in trade, which was considered in the House of Lords in November 2022 (this is, The House of Lords Special Public Bill Committee on Electronic Trade Documents Bill). Lord Parkinson of the House of Lords indicated that the bill would lay the foundations for the further digitisation of global trade approach. See <https://committees.parliament.uk/committee/636/electronic-trade-documents-bill-hl-special-public-bill-committee/news/175326/first-evidence-session-on-the-electronic-trade-documents-bill-hl/>.)

<sup>29</sup> See the submission of CLECAT to the European Commission ([https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation/F3347063\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation/F3347063_en).)

**4. TARGETED QUESTIONNAIRE (SECTION 4 OF THE CBER CONSULTATION DOCUMENT)**

*PLEASE NOTE THAT OUR POINTS ABOVE ARE ALSO RELEVANT TO OUR RESPONSES TO THE QUESTIONS BELOW.*

**4.1 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?**

- 4.1.1 BIFA Members have mixed views on this subject given recent developments within the shipping liner sector (including the impact of the pandemic on the sector).<sup>30</sup>
- 4.1.2 There is a general view among BIFA Members that some form of specific competition regulation or framework is required as opposed to merely falling back on general competition principles to support the liner shipping industry. However, some aspects of the current CBER require specific review and revision to align the CBER with current market conditions and to address particular concerns of our Members.<sup>31</sup>
- 4.1.3 We deal in more detail with these aspects in this response, but briefly, some of these concerns include:
- 4.1.3.1 The definition and evaluation of total market shares are too wide.
- 4.1.3.2 The application of the CBER is too wide and should be limited to certain services.
- 4.1.3.3 Medium and smaller forwarders have been impacted by liners withdrawing contract rates.
- 4.1.3.4 Data exchange and access by liners to commercially sensitive information at different levels of the supply chain because of vertical integration.
- 4.1.4 An internationally consistent approach to the competition regulation of the liner shipping industry would be beneficial in providing legal certainty and reducing compliance costs across multi-jurisdictional trade routes.
- 4.1.5 Additionally, retaining the CBER would align the UK liner shipping industry with other jurisdictions that also have CBERs in place.
- 4.1.6 BIFA is of the view that a mechanism needs to be put in place for more regular and consistent monitoring of shipping liner's activities, in addition to the tools already available from the CMA (including its cartels hotline). As raised in the Meeting, BIFA proposed the establishment of an ombudsman or specific maritime team within the CMA to exclusively deal with competition complaints and concerns raised in the shipping liner sector. Another

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<sup>30</sup> See paragraphs 3.1 to 3.7 above.

<sup>31</sup> See paragraphs 3.1 to 3.7 above.

prospective monitoring mechanism could be to require the compilation of an annual report to the CMA by each shipping line claiming use of the CBER. This report should contain details of market shares, participants and the routes of each member of a consortium, in every consortium within which it participates. Overall, BIFA is strongly of the view that the sector needs ongoing auditing and for any revised CBER to be subject to ongoing review at regular intervals.

- 4.1.7 BIFA notes that the Department for Transport’s “*Future of Freight: a long-term plan*” may be a good starting point to determine where a monitoring body could fit in.<sup>32</sup>

**4.2 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 (e.g., time spent with consultants).**

- 4.2.1 If the retained CBER were to expire, as there are no sector-specific competition guidelines in place in relation to the shipping liner sector, when dealing with competition issues players within the industry would have to rely on general competition principles contained in the Competition Act 1998.

- 4.2.2 BIFA is of the view that the CBER, in most instances, assists in providing a degree of legal certainty. However, in many ways, the current legal certainty provided by the CBER is focused on the relationship between consortia members and not also on the relationship between consortia members and their customers. In reviewing the applicability of the CBER going forward, care should be taken to look at the liner shipping industry holistically so that the impact on every member involved within the industry is taken into consideration.

**4.3 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?**

- 4.3.1 The liner shipping market is a complex and bullish one involving a number of vital business channels that affect UK consumers. For instance, the overall supply chain involves not just the liner companies, but also the types of businesses that BIFA represents. It is, therefore, imperative that the CMA should take all the various elements of the supply chain into consideration when looking holistically at the sector and the application of the CBER within the sector. Some examples of the types of issues that the sector faces which impact on BIFA Members (and ultimately UK consumers) include:

4.3.1.1 Delays to vessel schedules;

4.3.1.2 Volatile market conditions;

- 4.3.1.3 Changing market structure;
  - 4.3.1.4 Withdrawal of rates;
  - 4.3.1.5 Imposition of surcharges; and
  - 4.3.1.6 Issues with quay rent and demurrage charges.
- 4.3.2 These issues that our Members encountered had a negative impact on consumers by pushing up prices and creating shortages. Please see the points made in section 3 above.
- 4.4 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.**
- 4.4.1 On the one hand BIFA considers the scope of the retained CBER does not sufficiently deal with important issues affecting the wider sector. On the other hand, it may be beneficial to limit the application of the CBER to the provision of consortia services in deep-sea container shipping, and expressly exclude the CBERs application to other services provided by entities that have diversified logistics activities.
- 4.5 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.**
- 4.5.1 BIFA is of the view that the definition of “liner shipping” in Article 2.2 of the CBER needs adjustment. In the freight forwarding environment, the emphasis is on the containerised market. BIFA, therefore, proposes that the wording in Article 2.2 be amended to reflect this. For instance, the definition could be broken down by type of service:
- 4.5.1.1 Containerised freight
  - 4.5.1.2 Conventional cargo
  - 4.5.1.3 Out of gauge cargo
- 4.5.2 In particular, BIFA proposes that the application of the CBER should specifically relate to the provision of consortia services in deep-sea container shipping and should potentially expressly exclude application to other services provided by entities that also have diversified logistics activities.
- 4.6 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.**
- 4.6.1 BIFA agrees that Article 3(4)(a) on the ‘use of a computerised data exchange system’ requires updating and requires further clarity.

- 4.6.2 Any data obtained by the carrier is confidential and is only to be shared relative to:
- 4.6.2.1 Moving a particular consignment
  - 4.6.2.2 Assisting with ship planning/ including loading etc.
- 4.6.3 The sharing of information between entities should be limited to the specified data elements considered directly necessary for the efficient operation of vessel sharing agreements.<sup>33</sup> BIFA's Members are concerned this not always the case as described above. No data should be shared with other parties/ departments etc. except those directly involved in the movement of cargo on a particular vessel. Liners and consortia are likely to use this vagueness to their advantage, and it is ultimately leading to a situation where commercially sensitive information is exchanged.
- 4.6.4 Please refer to our comments above on BIFAs general concerns around information/ data exchange within the shipping liner sector.<sup>34</sup>
- 4.7 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.**
- 4.7.1 Capacity adjustments are a controversial topic in the liner shipping sector. Capacity adjustment as a mechanism should only be used to reflect market changes and not to influence/signpost those market changes.
  - 4.7.2 The CBER has allowed carriers to implement capacity management strategies that have led to lower service levels/reduced connectivity and denial of service. The CBER was adopted at a time when sharing capacity on the increased number of vessels available was useful to provide a frequent and reliable service with extended port coverage, which few individual carriers could provide alone.
  - 4.7.3 Currently, most container shipping networks are articulated along liner services, which allocate several ship assets along a loop involving a port-of-call sequence.<sup>35</sup>
  - 4.7.4 In view of recent market developments, consortia agreements have resulted in reduced sailing schedules and fewer direct connections between ports, reduced choice and reduced quality of services.<sup>36</sup>

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<sup>33</sup> See paragraph 3.6 above.

<sup>34</sup> See paragraph 3.6 above.

<sup>35</sup> For example, a typically scheduled liner service between northern Europe and the Far East uses a fleet of 11 to 12 ultra-large container vessels with a unit capacity of 16,000 to 24,000 TEU to provide weekly calls at, on average, four European ports and six Asian ports strategically located along the route. Please see <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9399991/#:~:text=For%20example%2C%20a%20typically%20scheduled,strategically%20located%20along%20the%20route..>

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- 4.7.5 Since mid-2019, European countries are estimated to have lost approximately 15% of their direct connections with the Far East. Where there are less direct connections between countries, containers need to be transhipped from one or more ships to reach their final port destination.<sup>37</sup>
- 4.7.6 Since the latter part of 2020, shipping lines have been adjusting their networks, shifting capacity from services serving more than two regions in favour of services serving only two regions. Scheduled capacity at the start of 2022 dropped by 2.3%, while deep-sea maritime demand grew by 4.1%. In adjusting their networks, liners have been cutting calls while the number of country pairs without direct connections have increased.<sup>38</sup>
- 4.7.7 Available capacity has increased by existing ships making more frequent ‘shuttle’ voyages between port pairs at the expense of longer, loop sailings offering more port calls.<sup>39</sup>
- 4.7.8 MDS Transmodal Container Shipping Market Quarterly Review 2022 Q2, for example, highlights that the overall capacity offered on the Europe-Far East trade lane grew by 8.3% between Q1 2020 and Q2 2022. But the reduction of direct connections has resulted in a reduction of available deployed capacity, thus making it difficult for freight forwarders to move cargo on a predictable basis.
- 4.7.9 These developments have disrupted supply chains which increased the freight forwarders’ costs of warehouse storage for “just-in-time” customer commitments and delays in ports. Schedule reliability dropped drastically from 65% in February 2020 to 35% in January 2021.
- 4.7.10 Whereas carriers ceased ‘blank’ sailings when the demand came back in the second half of 2020, vessel ‘slidings’ (which is the carriers’ strategy of delaying advertised sailings) led to further disruptions. During the Covid pandemic, carriers operating in consortia have introduced severe restrictions of supply and record-high container shipping spot rates, at a time when the pandemic did not significantly increase the carrier’s operating costs or reduce their available capacity.<sup>40</sup>
- 4.7.11 In conclusion, the CBER has allowed carriers to implement capacity management strategies that led to drastic increases in tariffs and contributed significantly to inflation.

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<sup>36</sup> The MDS Transmodal data shows that between Q1 2020 and Q2 2022, the number of direct connections between EU countries and Far-East countries decreased by around 8.5%, even reaching an 11.7% decrease in Q1 2022.

<sup>37</sup> The implication of this is that there are costs for freight forwarders in terms of freight rates, transhipments costs, detention and demurrage fees, and more unpredictability in case of delays or cancellation of feeder journeys for example.

<sup>38</sup> <https://www.itf-oecd.org/sites/default/files/docs/performance-maritime-logistics.pdf>

<sup>39</sup> MDS Transmodal Container Shipping Market Quarterly Review.

<sup>40</sup> See [https://safety4sea.com/wp-content/uploads/2022/07/International-Transport-Forum-Performance-Maritime-Logistics-2022\\_07.pdf](https://safety4sea.com/wp-content/uploads/2022/07/International-Transport-Forum-Performance-Maritime-Logistics-2022_07.pdf).



**4.8 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?**

4.8.1 BIFA agrees the current hardcore restrictions should remain. However, please refer generally to our comments above regarding, for example, how BIFA believes shipping liners are using the movement from contract rate to spot rate for freight forwarders as an indirect means to adjust capacity (specifically in circumstances where shipping liners have opened their own freight forwarding arms), and how this can ultimately lead to the sharing of non-consortia related information with the freight forwarding arm of the shipping liner’s operation.<sup>41</sup>

**4.9 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.**

4.9.1 As noted above, where liners and consortia have shared commercially sensitive information or shipping liners have further benefited from the ability to form consortia, this is of great significance to freight forwarders.

**4.10 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**

4.10.1 It is difficult to reach a conclusion on this point based on BIFAs consultation with its Members. However, experience suggests that retaining the current hardcore restrictions would be important for consumers.

**4.11 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?**

4.11.1 BIFA is pleased the CMA has specifically asked this question. A key issue in the sector is whether certain liners are dominant or not and should be able to benefit from the CBER despite what appears to be their considerable market power. Our Members are simply unable to effectively compete with certain

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<sup>41</sup> See paragraph 3.6 above.

liners that have also vertically integrated. BIFA would therefore propose that the current 30% market share threshold be lowered to a minimum of 25%. This would be in correlation with other horizontal block exemption regulations.<sup>42</sup>

4.11.2 BIFA has also seen a steady decrease in the number of shipping liners within the sector as the market consolidates.

4.11.3 When measuring market share, BIFA proposes that this figure should include the market shares of all consortia in which the shipping line participates on the route to which the CBER is being applied.

**4.12 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?**

4.12.1 BIFA would like to make the following comments that the CMA should take into consideration when reviewing conditions relating to market share:

4.12.1.1 the difficulty in establishing market share with certainty;

4.12.1.2 the fact the consortia need to self-assess their market shares and this is not verified by the CMA or an auditor given the self-assessment regime so is “routinely breached”;

4.12.1.3 the situation where one carrier’s global market share is concentrated on a particular route. For instance, the route from the Far East to Northern Europe is the most important route in the world, so if one carrier has a 40% share on that route but much lower market shares on other routes, that may skew the statistics.

**4.13 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**

4.13.1 BIFA is of the view that this would have a significant negative impact on its Members, given that potentially more shipping liners and consortiums with greater market power would be able to benefit from the exemption provided

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<sup>42</sup> See the Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022 and the Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022.

in the CBER, which would simply exacerbate the issues faced by BIFA's Members as outlined in this response.

**4.14 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**

4.14.1 The consensus among BIFA Members is that this would have a moderately positive impact at the very least, as it would increase competition both for liner shippers and within the supply chain, and potentially make it harder for larger consortia members to arrange their activities in a way that exploits the higher market threshold requirements.

**4.15 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?**

4.15.1 BIFA is unable to respond to this question as the other listed conditions under Article 6 of the CBER would mainly impact shipping lines.

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

4.16.1 BIFA agrees with the CMA in its comments in paragraph 5 of the Consultation Document 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"*.

4.16.2 BIFA also notes that should the proposed CBEO be put in place without an expiration date, 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. This is important given BIFA's submissions in relation to monitoring and auditing as set out in paragraphs 4.1.6 above.

4.16.3 As the shipping liner sector is a complex sector and given that the market is subject to regular change due to evolving market conditions, BIFA is of the view that the expiry date of the CBEO should be fixed in order that this sector is again reassessed robustly to ensure any CBEO is fit for purpose. Ensuring

regular reviews of the state of the market and the efficiency of the CBEO every 4/5 years is vital.

**4.17 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**

4.17.1 BIFA member feedback is divided between responses D and E. This is because of the importance of ensuring the CBEO is regularly reviewed and fit for purpose given the dynamics of the sector.

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

4.18.1 Given the importance of the shipping liner industry on the wider economy, businesses, and the consumer, regular scrutiny of the CBEO is essential to ensure continued compliance and to assist in maintaining competition in the shipping liner sector. Though BIFA Members were concerned that consortia may behave differently outside of review periods, so it would be crucial that the CMA is alive to this possibility.

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

4.19.1 BIFA has nothing further to add other than the comments it made in section 3 of this response.