



The Global Voice of Cargo Owners

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23 February 2023

Dear Sir/Madam

**GSF Response to CMA Consultation on Liner Shipping Consortia Block Exemption Regulation**

I am responding on behalf of Global Shippers Forum (GSF) to CMA's consultation document entitled "UK Competition Law: Liner Shipping Consortia Block Exemption Regulation".

GSF is a global trade organisation, registered in, and operating from, the UK. GSF represents the interests of cargo owners in international trade through a membership of over 20 national shippers' associations around the world. As such, GSF speaks for importers and exporters who contract for transport of their cargoes by sea either directly with shipping lines or through freight forwarders or other intermediaries.

As part of its consultation process, CMA invited GSF to present its case for reform of the existing Block Exemption arrangements in a meeting held in October 2022. GSF's presentation was based on its then recently submitted response to the European Commission's evaluation of the EU Consortia Block Exemption Regulation, which remains ongoing. Points made in that meeting and in the GSF submission are cited in CMA's consultation document and GSF is grateful to CMA for considering its positions in the course of this consultation.

As was explained to CMA at the time, it is not the role of GSF to respond to consultations made by national governments in countries where shippers are represented by their own national shippers' association. However, GSF wishes to make the following observations having seen the positions taken by CMA on several of the points GSF made to it.

1. GSF is disappointed that the proposition under consultation is that the existing arrangements be effectively continued unamended, albeit under new primary legislation in the UK. Given the evidence cited by CMA in the consultation document of the adverse economic impacts of high shipping rates and poor liner service quality over the past three years, GSF had hoped CMA would conduct a more thorough examination of the need for, and justification of, a long-standing Block Exemption Regulation inherited from the EU. GSF identified a number of ways in which legal certainty for vessel sharing agreements could be granted to shipping lines that offered greater transparent, were better targeted and more easily enforced, but development of these options requires a commitment to reform which the CMA has evidently decided not to pursue.

2. GSF is surprised that so significant a concession to supply-side interests is being formally recommended for retention by CMA. GSF had hoped CMA would have required liner shipping consortia to make their own case that the Block Exemption was still required, including why the current scope of the exempted activities remained necessary, and how they would demonstrate compliance with the existing constraints to CMA's satisfaction. Instead, representatives of shippers' interests find themselves needing to make an overwhelming case to reclaim shippers' statutory rights to protection against anti-competitive practices by their suppliers, in order to reverse CMA's proposed course of action. This places the burden of proof for change in policy on those representing consumers interests (shippers being consumers of liner shipping services).
3. The consultation document does not reveal CMA's reasons for accepting arguments that the Block Exemption Regulation had no bearing on shipping rates and levels of service during the Covid pandemic and simply states that insufficient evidence was provided to support this position but that the data supplied by the shipping industry insisting this was not the case, was persuasive (paragraphs 4.11 and 4.12). This seems to set an arbitrarily low bar for the shipping industry to scale in order for its case to be accepted. Given this issue was the principal point of contention raised by UK shippers with CMA during the pandemic and that CMA has acknowledged the economic impacts of higher rates and service delays (paragraph 4.10) GSF feels the burden of proof should be shifted to shipping lines to demonstrate that the co-operations permitted by the Block Exemption did not contribute to elevated prices and changes in service patterns, and that CMA's reasons for accepting this made public.
4. GSF is concerned that CMA has offered scope for possible further concessions to shipping lines by inviting comments on the duration of the CBEO (Policy Question 16), market share thresholds (Policy Question 11) and the hard-core restrictions (Policy Question 8).
5. GSF notes that the current hardcore restrictions of the current Block Exemption are the only features distinguishing it from the liner shipping conferences Block Exemption that were abolished by the European Union in 2008. This question leaves CMA open to speculation that it may be willing to consider a case for relaxation of the current prohibition on price-fixing and capacity limitation and GSF would welcome CMA's reassurance this is not the case.
6. GSF is concerned that removing the expiry date from the Block Exemption Order would embed it as a permanent concession for the co-operative behaviours of the shipping industry in UK competition law. A reason for including a sunset clause originally was that the need for a Block Exemption was considered temporary as the container shipping industry transitioned from the protections provided by liner shipping conferences to a more open and competitive market. Rather than suggesting permanency, regulatory authorities should be setting a deadline by which the shipping industry is expected achieve normalcy in its competitive behaviours.
7. GSF would welcome however, the development of clearly defined market conditions that would trigger an investigation of shipping line behaviour by CMA. These could consist of a series of agreed performance indicators which would initiate CMA investigation should they move outside pre-determined ranges in defined time periods. Given recent market experiences, such investigation triggers should be implemented regardless of whether the CBEO retains an expiry date.
8. GSF thanks CMA for including its concerns about use of the term 'computerised data exchange system'. (Policy Question 6). We expect you will receive many suggestions at the ways this term could be adapted for 21<sup>st</sup> century use! However, GSF's purpose in raising this point was to

highlight our serious concern at the much greater scope for exchange of information between co-operating parties using modern information and communications technology than was conceivable by regulators when the Block Exemption regulation was first drafted. Whilst the phrase 'computer data exchange system' is archaic and does betray the age of the Block Exemption, what should be carefully reviewed by CMA is the scope for permitted exchanges of information to take place using the modern incarnations of these systems which enable data to be exchanged in real-time, between multiple locations and which can then be subject to deep analysis for pattern recognition and market intelligence, quite likely aided in the foreseeable future by artificial intelligence. In recommending the Block Exemption for renewal CMA should satisfy itself that shipper interests will not be harmed and that it is able to maintain adequate oversight of permitted exchanges using modern and near-future 'computer data exchange systems'.

9. The primary point made by GSF in its response to the European Commission, and in its presentation to the CMA, is that the wording of the exempted agreements appears unlimited in scope and open to wide interpretation. GSF maintains that the scope of permitted activities is far wider than is necessary to facilitate the vessel sharing agreements they are intended to allow. GSF welcomes CMA's Policy Questions 4 to 7 on the scope and definitions of the CBEO but regulatory language should not be a matter for the affected parties alone. GSF's point is that CMA itself needs to be satisfied that the wording of the CBEO provides it with a legally sound basis for deciding when permitted co-operations have been exceeded. GSF does not believe this possible with the current wording of Article 3.
10. As an example, GSF invites CMA to explain how it would adjudicate between detected co-operations on 'capacity limitations' that are currently one of the hardcore restrictions, and co-operations on 'capacity adjustments', which are one of the exempted agreements. GSF contends that the effect of these would be indistinguishable in the marketplace, especially during periods of disruption as recently experienced. Yet this is the distinction that UK and EU competition authorities have been called on to make over the last three years. It remains unclear how exceedances of the permitted limits of co-operation set by the Block Exemption have been enforced in the past, or could be so in the future, given the current scope and wording.

GSF trust these observations are helpful, thanks CMA for considering the points made and remains available for further discussions with CMA as it considers the outcomes of this consultation.

Yours faithfully

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**James Hookham**  
Director



The Global Voice of Cargo Owners



## Reasons and Ways to Reform the EU Consortia Block Exemption Regulation (CBER)

A Briefing for Policymakers by GSF, CLECAT and FIATA

February 2023

The EU Consortia Block Exemption Regulation is currently being evaluated by the European Commission.

The Regulation exempts container shipping lines from parts of general EU competition law so they can co-operate together in consortia to provide shared services for their customers. Shippers and forwarders have long resisted the granting of these extraordinary exemptions to shipping lines and have opposed a renewal of the Block Exemption, especially in its present form, at previous reviews.

SME shippers and forwarders, in Europe and around the world who will be vulnerable to the threats posed by loss of competition have a significant interest in ensuring fair and equitable access to ocean transport. As the organizations representing their voices in Europe and around the world, CLECAT, FIATA and GSF aim to inform policymakers of the issues faced and at the end of this document, propose multiple scenarios and outcomes as solutions that accommodate the needs of all supply chain stakeholders and the consumers they serve.

There are 5 reasons why competition rules for the container shipping industry should be reformed at this review:

### 1. Benefits Not Shared

- The CBER was last renewed, unamended, in April 2020 when the European Commission concluded that the benefits derived from consortia operation by carriers had been shared fairly with customers of their services in the preceding five years. This has not been the experience of shippers and forwarders over the last three years.
- Capacity was severely constrained, resulting in huge increases in shipping rates; vessels have been re-deployed, creating shortages in European trade lanes; and European ports have been frequently skipped, creating further pressure on capacity and rates locally.
- Aggregate profits in the liner shipping industry exceeded \$250 billion in 2021-22 and are likely to reach \$300 billion in 2022-23, yet tax rates on these profits are likely to amount to less than five percent, and in many cases less than one per cent, due their calculation based on vessel tonnage operated rather on the gross profits actually made. Over half-a-trillion dollars in wealth has therefore been transferred from the global economy to the balance sheets of a small number of shipping corporations, many family-owned or controlled.
- The impact on European small and medium size businesses has been severe, with many failures because of inability to meet contracted delivery deadlines for imported goods placing intolerable pressures on cash-flow in these smaller enterprises.
- The ability of consortia members to co-operate legally yielded few tangible benefits for customers during the global health pandemic, with co-ordination seemingly used solely for self-protection and profit maximization by the shipping industry, rather than optimize services for customers.
- This has persisted in recent months with permitted co-ordination now being used to selectively remove scheduled sailings to maintain profitability, despite a sharp downturn in world trade.

***The CBER should not be renewed in its present form as it has failed to fulfil the Commission's primary condition for renewal, being fair distribution of benefits to customers.***

## 2. Unbounded Scope for Unintended Co-operation

- The purpose of the CBER is to provide legal certainty that shipping lines co-operating in consortia will not be investigated under general EU competition rules.
- The co-operations envisaged are the operation of vessel sharing agreements and where exchange of normally commercially sensitive information is necessary.
- However, the scope of the permitted co-operations far exceeds that necessary for their intended purpose of facilitating vessel sharing agreements.
- The information that may be exchanged and the reasons for its exchange are poorly defined and not limited in time or scope.
- Shipping lines have been handed virtually unlimited scope to co-operate to achieve very limited outcomes.

***The CBER should not be renewed in its present form as it provides excessive scope for unintended co-operations, far beyond those necessary for the operation of vessel sharing agreements. Better techniques are available or can be developed that provide users and regulators with more transparency.***

## 3. Unenforceable and Unenforced Limits

- The CBER's exemptions only apply to shipping lines operating in consortia where the total market share of the consortia is less than 30 per cent of the traffic on the route served.
- The definition of 'market share' is ambiguous and open to interpretation.
- Reported market share data do not include all of the consortia in which shipping lines are participating. The market shares of the numerous consortia formed between shipping lines in different alliances are not routinely included in this calculation. Half of the consortia in the trades to/from Europe exceed the 30% threshold, so are no longer covered by the CBER.
- When the true market shares are included, several consortia are found to routinely exceed the limit of application of the CBER.
- The continued operation of these consortia demonstrates that the costs of compliance are manageable and that the ending of the CBER would not jeopardize consortia formation and operation in the way the shipping industry predicts.

***The CBER should not be renewed in its present form as the limits to its application appear unenforceable and exceedances of these limits do not appear to initiate any different behaviour by the shipping lines affected. Consortia operating outside the CBER appear to be comfortably meeting the costs of compliance under normal competition rules.***

## A much changed, highly concentrated container shipping sector ...

- The structure of the sector and the operating environment in 2023 is unrecognizable compared to the mid-1990s, when a Block Exemption for liner shipping was first implemented.
- The continued granting of a Block Exemption from general competition rules for mere cost and administrative convenience in such a highly concentrated market should be carefully re-evaluated
- These costs of compliance are borne by similar sized companies in every other industrial sector and are the costs of doing business and protecting consumers in the European Union.

***The CBER should not be renewed in its present form as it is no longer appropriate in a highly concentrated market. It is inhibiting the building of trust and enduring partnerships needed for progress to be made on crucial future issues such as decarbonization, digitalization, resilience building against future supply chain shocks.***

#### **4. ...that is rapidly diversifying into other modes and supply chain functions**

- Several of the largest container shipping lines have embarked on strategies to provide other functions in the supply chain outside of their traditional port-to-port activities, such as forwarding, warehousing, inland logistics and even air cargo operations. This is largely being achieved by acquisition of established businesses. Several shipping lines are already owners of significant port terminal businesses.
- The application of the Block Exemption to the provision of these services in partnership with other consortia members is unclear and presents risks to fair competition that were not apparent when the Block Exemption was first implemented or last renewed.
- The continued availability of the Block Exemption to parts of these rapidly diversifying businesses creates potential market distortions in the overall logistics market, where container shipping lines are competing against other global logistics service providers who are required to comply with general competition rules.

***The CBER should not be renewed in its present form as it is neither appropriate nor equitable in diversified logistics activities that its beneficiaries are now performing in the wider logistics market.***

#### **Towards more transparent, better targeted, and easier to enforce regulation**

There is ample scope for regularising application of EU competition law to the container shipping sector. Ending the privileges of the Block Exemption merely means that the normal requirements for open competition will apply. The needs of the liner shipping industry to operate consortia can be met in other ways. Below are the different possible scenarios and their outcomes:

**Revoke and replace the CBER with a new permissive system** that authorises the minimum co-operative behaviours necessary to operate vessel sharing agreements in the container shipping sector.

**Revoke and apply new sector-specific guidelines** that will provide shipping lines with clear limits to their ability to co-operate within the existing and recently revised EU Horizontal Agreements Regulation.

**Just revoke the CBER by not renewing it in 2024**, which from the date of expiry would require shipping lines operating in consortia to conduct routine assessments of the compliance of their behaviour. The compliance costs and disincentives to consortia formation predicted by the shipping industry do not appear to have deterred the formation and operation of consortia by shipping lines that regularly exceed the current permitted market shares.

**Revise and Refresh the CBER**, to clarify and update its applicability and scope of its exemptions, and to place a new duty on its beneficiaries to monitor and account for their compliance. Specifically:

- to tighten the definition and evaluation of total market share to expressly include the market shares of all consortia in which the shipping line participates on the route to which the Block Exemption is being applied.
- to limit the sharing of information between entities to the specified data elements considered necessary for the efficient operation of vessel sharing agreements.
- to limit the application of the CBER to the provision of consortia services in deep-sea container shipping, and expressly exclude its application to other services provided by entities with diversified logistics activities.
- to require the compilation of an annual report to the Commission by each shipping line claiming use of the Block Exemption, which contains the routes, participants and market shares of each of the consortia in which it participates.
- to require shipping lines wishing to use the (modified) CBER to designate a director of the company as the 'Competition Compliance Officer', accountable to the European regulator for the company's compliance with the provisions of a revised and refreshed CBER.