

UK competition law: Liner Shipping Consortia Block Exemption Regulation Consultation Document –

THE Alliance Response submitted by Reed Smith LLP on 23 February 2023

Introduction

Reed Smith LLP, an international law firm with 31 offices globally including London and Brussels, has been instructed by Hapag-Lloyd AG, HMM Co., Ltd., Ocean Network Express Pte Ltd and Yang Ming Marine Transport Corp. and Yang Ming (UK) Ltd. and Yang Ming (Singapore) Pte.Ltd. (“THE Alliance”) to prepare and provide this response to the CMA.

THE Alliance is an East-West consortia shipping alliance. THE Alliance has 260 ships covering 31 services and representing capacity of **[confidential]** million TEUs. THE Alliance provides services to Europe (including ports in the UK), to and from the Far East and across the Atlantic. There are 7 services of THE Alliance that have ports of call in the UK at Southampton and London Gateway.

In addition to providing this response, THE Alliance would be happy to meet with the CMA to discuss and answer questions on the wider benefits of shipping consortia and the importance of the Consortia Block Exemption Regulation.

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?](#)

THE Alliance agrees with the CMA's proposed recommendation to make a block exemption order to replace the retained CBER.¹ Having a consortia block exemption order (the “CBEO”) will continue to ensure legal certainty on the exempted agreements set out in Article 3 of CBER.

There are no other UK guidelines (such as the horizontal guidelines or specialisation block exemption) that appropriately deal with vessel sharing agreements in the maritime industry. If the CBER is abolished without replacement it may be that:

1. Shipping lines would reduce ports of call in the UK because of the lack of certainty as to how their agreements would be treated.
2. Shipping lines would have to separately self-assess that each arrangement complies with competition laws which not only would generate high legal cost, but would also prove difficult in the absence of dedicated rules for the liner shipping sector providing certainty on compliance.

The CBEO would also ensure that the UK's regulation in this area is consistent with other major shipping hubs. Several significant jurisdictions have recently extended their consortia block exemption provisions, including Hong Kong until 8 August 2026, Singapore until the end of 2024, and Israel until 18 October 2025.

English law is considered across the world as a leading authority for maritime contracts and law it is

¹ 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).

incorporated into many shipping contracts, even those where there is no connection to UK ports. For this reason English law has influence globally. If the UK were to change its position from the current CBER, this could have an impact globally, and create regulatory confusion. This could also be costly for shipping lines.

In parallel to the CMA, the European Commission is currently reviewing the CBER. Shippers forums are critical of the CBER and have called for a sector regulator to monitor activities of shipping consortia.² The U.S. have a system whereby notifications are made to the Federal Maritime Commission. Having said that, having a specific sector regulator for maritime activities performing real-time monitoring would incur significant cost for the UK.

The biggest advantage of the CBER is that it allows lines to join up to provide ships, which results in more regular services, larger ships and lower slot costs. This in turn results in higher frequency of service as the lines are jointly able to fill up larger ships.

If goods had to be trans-shipped from other ports in Europe to the UK, rather than having direct sailings from the Far East and North America to the UK, this would incur longer wait times and higher costs. This is because if there was no direct port of call, not only the goods would have to be unloaded in another continental European port, which would generate additional terminal handling fees and potential storage fees, but in a second step the goods would then need to be loaded onto a feeder ship to eventually reach the UK.

The consortia block exemption allows smaller lines [confidential] to compete with the largest lines in the market through alliances and consortia.

Rank	Operator	Teu	Share	Existing fleet	Orderbook
1	Mediterranean Shg Co	4,668,226	17.8%		
2	Maersk	4,207,592	16.0%		
3	CMA CGM Group	3,383,483	12.9%		
4	COSCO Group	2,866,465	10.9%		
5	Hapag-Lloyd	1,795,177	6.8%		
6	Evergreen Line	1,661,469	6.3%		
7	ONE (Ocean Network Express)	1,533,332	5.8%		
8	HMM Co Ltd	816,365	3.1%		
9	Yang Ming Marine Transport Corp.	705,614	2.7%		
10	Zim	526,437	2.0%		

Source: Alphaliner³

In the absence of the UK introducing a block exemption order lines would lose certainty on how their agreements would be treated in the UK.

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).

Yes. As set out above, the absence of legal certainty would make the UK a less attractive market to do business in and its laws would not be harmonious with other jurisdictions.

THE Alliance members have internal and external costs for competition compliance.

Internally, lines have members of the legal committee who manage compliance day to day.

Externally, THE Alliance lines pay external legal counsel to conduct self-assessment and monitor

² See for instance submission to the European Commission of Global Shippers Forum (based in the UK) dated 3 October 2020. This organization calls for greater monitoring and enforcement in real time by the sector regulator.

³ Taken from Alphaliner TOP 100 / 16 February 2023 (<https://alphaliner.axsmarine.com/PublicTop100/>)

compliance with competition laws. If the UK decided to let the CBER expire, these costs would be considerably higher as the assessment is focused on complying with the obligations and conditions attached to the block exemption, except in relation to market on a single trade.

If Article 5(2) of the CBER did not exist members of a consortium would not have sufficient guidance, and would have to engage and pay economists to calculate market shares, given that consortia are not single undertakings.

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?

Consortia bring benefits to UK consumers (as set out below). The CBER enables these benefits to be easily realised by lines wishing to enter a consortia/alliance agreements.

The key benefits of consortia include:

- (a) guaranteed fixed day sailings over a fixed period meaning goods can be delivered regularly and on time;
- (b) the ability to offer a service of the frequency required with the number of vessels necessary to meet shippers' requirements;
- (c) economies of scale which not only allow lines to remain viable, but also ensures that the service provided by the shippers is efficient, reliable and thus cost effective for the consumers;
- (d) improved frequency of service resulting in improvements in the quality of the supply chain from the manufacturer to the ultimate consumer, which is an essential part of improving industrial competitiveness and economic development. In today's "just in time" environment, the suppliers have all but eliminated inventory – the cost of storage of an item can be higher than the cost of shipping. In April 2020, the cost of shipping US\$100 training shoes from China could be as low as US\$0.10, making shipping cost-irrelevant in product cost terms;⁴
- (e) the use of common terminals and vessels by lines allows a common efficient approach to operations which benefits customers by enabling them to receive accurate information about the whereabouts of their goods;
- (f) consortia are trade-related and depend on cooperation between shipping lines on the ocean leg of container transit; such cooperation improves the service and reduces cost without affecting intense competition for customers with consortia. Alternative to consortia is market restructuring which would only be achieved through a merger or acquisition. This would arguably reduce the overall options of customers on various trades. The advantage of consortia, such as THE Alliance, is that competition remains intense and robust even between lines within the same consortium;
- (g) consortia which operate a number of loops and operate "best ship for the loop" are able to redeploy vessels between loops and ensure the efficient re-use of assets;

⁴ <https://www.bbc.co.uk/news/business-52289303>

- (h) improved utilisation of both on-shore facilities (including container handling facilities and terminals) and of containers and related equipment. This brings with it added environmental benefits as the consortium is able to negotiate berthing windows at ports, which ensure the consortium's vessels do not have to waste time waiting to enter a port. As a result, fewer vessels are needed to maintain the service. Moreover, vessels are expensive assets, and if they are left idle while waiting to enter a port, vessel costs increase significantly. This has a detrimental knock-on effect on the regularity of the service which is demanded by the shippers; and
- (i) specific benefits of THE Alliance to shippers (and consumers):
 - The link-up of THE Alliance on the transpacific and transatlantic in addition to Asia/Europe trades allows the cascading of ships across trades **[confidential]**, with larger ships serving the Atlantic than was previously the case. Thus whilst the number of ships on the Atlantic will drop, the available TEU capacity will not. **[confidential]**
 - These promises of more efficient utilisation allow THE Alliance to use larger classes of ships that are cheaper to run per TEU relative to smaller classes due to efficiencies and economies of scale. DG Comp acknowledges that *“for a vessel to be operated profitably it has to reach a certain level of space utilisation; a higher utilisation also means lower cost per container.”*⁵
 - The high level of integration within the consortium allows **[confidential]** a more efficient and tailored service.
 - The preservation of more services covering more port pairs throughout the business cycle, and in the face of changing demand.

In the absence of the cooperative arrangement, THE Alliance would not be able to provide equally reliable and efficient services in the East-West market. Having alliances and consortia should therefore be viewed as pro-competitive as it allows existing competitors to remain in the UK market. Indeed, greater harm would be done if members could no longer afford to operate services because they could no longer cut costs through co-operation, because in such case the alternative would be increasingly damaging losses, ultimately leading to reduced shipping services.

Consortia allow smaller lines to participate, more carriers can offer capacity and services from and to a country when consortia are present. Through consortia smaller lines can afford to offer services on routes where they would otherwise be unable to reach the minimum required volumes to operate in individually. This gives a benefit to those small lines and also to consumers – who have more choice, because a greater number of lines call at ports in the UK.

In addition to the benefits above two particular benefits are important to the UK:

1. **Goods being delivered “Just in Time”** – there has been an increase in demand for goods since the start of the COVID-19 pandemic. Consumers and businesses expect goods to be delivered quickly through regular services. The pandemic is believed to have hastened the

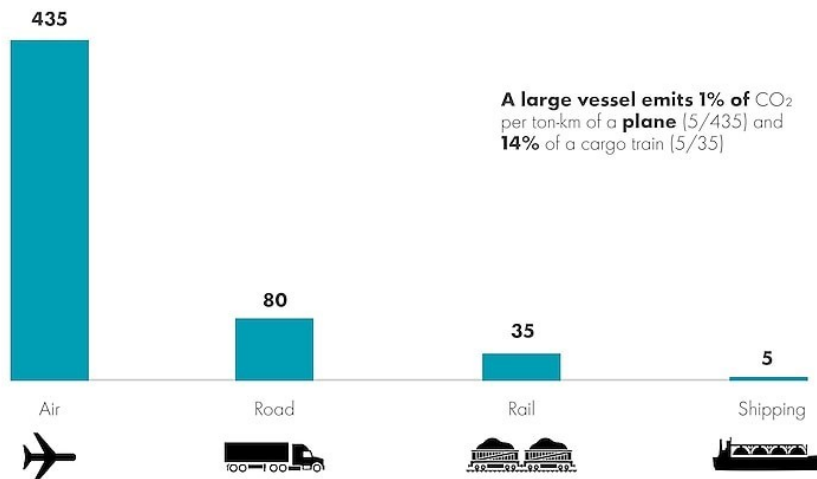
⁵ EC Staff Working Document– section 5.3.4 ‘efficiency gains’ page 28. (Brussels, 20.11.2019 SWD(2019) 411 final)

global transition to e-commerce (by as many as five years, according to IBM) and thereby increased the volume of goods requiring transportation. E-commerce platforms have been able to provide seemingly uninterrupted services to consumers during the pandemic and local lockdowns. There is an expectation from UK consumers to be able to receive the goods that they want (that may have been manufactured anywhere in the world) quickly. Consortia are able to run regular weekly service. Individual operators would not be able to run services as frequently.

2. **Environmental benefits** – analysis of the carbon footprint of the transportation industry has been a focus. Cop 26 and other environmental initiatives have seen global stakeholders focus on the benefits of sustainable services. Having space better utilised through consortia using larger ships has clear benefits compared to other methods of transports and is much more efficient in terms of CO2 emissions than air, road and rail.

Emissions by Mode of Transport

g CO₂/ton-km^{1,2,3}



Source: Shell⁶

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.

THE Alliance agrees with the CMA that the scope should be retained and that the CBEO shall apply to consortia only in so far as they provide international liner shipping services from or to one or more UK ports.

⁶ <https://www.shell.com/energy-and-innovation/the-energy-future/greenhouse-gas-emissions-in-shipping.html> - Notes: Energy-efficient transport is much dependent on the load factor, vehicle efficiency and cargo type; heavier cargo and larger vehicles will improve the cargo/vehicle weight ratio, resulting in better CO₂/ton-km values

Air = Boeing 747, Road = Truck > 40 ton, Rail = 3-4 hp / short-ton, Shipping = Average of very large container vessel (3 gCO₂/ton-km), oil tanker (6), bulk carrier (8)
Estimations assuming current energy mix

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.

An update to the definition of 'consortium' should be made to expressly include that alliances (which are vessel sharing agreements covering multiple trades) are included within the definition.

The other definitions included in Article 2 are fit for purpose.

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.

THE Alliance considers that Article 3(4)(a) "any other activity ancillary to those referred to in points 1, 2 and 3 which is necessary for their implementation, such as: the use of a computerised data exchange system" is helpful to retain in the CBEO.

As background, THE Alliance **[confidential]**

The types of information exchanged, that is ancillary to article 3 sections (1) to (3), are: **[confidential]**

As the CMA will understand, a certain degree of information exchange on a need-to-know basis regarding operational information is necessary to ensure that joint operation of liner services, capacity adjustments (in response to supply and demand) and the joint operation of terminal and related services. The exact electronic data exchanges used will vary. EDI development and applications vary by line depending on internal IT developments. **[confidential]**

If the CMA includes to narrower provision in Article 3(4)(a) this could limit its application and make it more difficult to exchange sufficient data to operate the consortia. For clarity, the CMA may want to add to article 3(4)(a) that this includes email exchange as well as electronic data exchange (EDI) such as RDR. The CMA could in notes or recitals to the CBEO include the types of information (as listed above) for guidance. We would suggest this is guidance because it is an evolving area.

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.

THE Alliance considers the exempted agreements set out in Article 3 to be very helpful and allowing for the successful operation of consortia.

THE Alliance proposes the following addition to Article 3:

- the collaboration in relation to vessel and fuel efficiency to assist with energy transition towards net zero targets;

Collaboration on 'green' initiatives is currently limited and not specifically enabled by the CBER.

Each line in THE Alliance has ambitious green plans and there is international regulation to reduce the carbon impact of the shipping industry. For instance, the International Maritime Organisation ("IMO") has set a target of reducing annual GHG emissions in shipping by at least 40% by 2030 and pursuing a 70% reduction by 2050.

To achieve reductions in emissions energy transition is required in terms of ships and fuel efficiency. Currently the normal position is that the ship operating line in a consortium is solely responsible for the vessel and fuel used. If another line is more advanced in ensuring vessels and fuel are environmentally efficient they currently are not permitted to share this by relying on the CBER. This means that goods

of that consortium may not be transported in the most environmentally neutral way. Having the suggested provision in the CBEO will enable improvements in the environmental efficiency of the transport of containerised goods.

This type of provision would also show the UK's dedication to meet green targets and be a leading authority in this area.

Although THE Alliance does not carry out every activity in Article 3, it could do so in the future depending on the situation. It is important that the CBEO has a sufficient list of exempted agreements that allows flexibility and collaboration to happen when it needs to.

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?

Yes. THE Alliance does not propose changes to Article 4.

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.

THE Alliance does not consider there to be any issues with retaining the current hardcore restrictions.

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

- a) Significant positive impact

Market definition and market share thresholds

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?

THE Alliance agrees with the CMA's current proposals to retain the current market share threshold. Theoretically, any increase in threshold could be helpful to consortia generally.

Previously, under the old non-exemption procedure in Europe (applicable prior to the creation of THE Alliance), the European Commission gave exemptions to consortia with market shares above the 30% threshold particularly on trades that had specific market conditions – such as low volume trades or trades requiring special equipment.

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?

Article 5 is extremely helpful in explaining how market shares are calculated for consortia. Shipping consortia are not single undertakings. Thus the SSNIP test cannot be used to define the relevant market. Without guidance from Article 5 understanding how market shares should be calculated would be complex and likely require input of economists.

Since the introduction of the consortia block exemption regulation, guidance has been given on the interpretation of Article 5 by the European Commission through, for instance, Staff Working Papers and merger decisions. It may be helpful to include this within the CBEO for consistency and clarity going forward.

THE Alliance suggests the additional wording to be added at the end of Article 5(2) –

For the purpose of calculating combined market shares:

(a) consortia members include those lines that provide services through cooperation agreements with other shipping companies. Cooperation agreements include vessel sharing agreements and alliance agreements and exclude slot charter agreements which do not normally involve joint decision making concerning marketing, ports of call, schedule or the use of the same port terminals; and

(b) total volumes of goods carried on both legs of trade combined should be included

Addition (a) sets out guidance from the European Commission in merger decisions on the treatment of consortia compared to simple slot charters which do not need to be included in the calculation of market share. The basis of this is that slot charters are merely renting space and do not have any decision making powers in relation to the running of the joint arrangement (such as deciding ports of call).

Addition (b) expressly includes guidance previously given by the European Commission that the combined volumes on both legs of trade should be used. The market comprises both legs of trade. Adding this would ensure future clarity. Lines in THE Alliance have previously had guidance from the European Commission that in calculating market share, they should carry out this exercise by trade, such that each leg within a trade should be combined. For instance see the letter from the European Commission at Annex 1, which combines legs of trade to come up with the total market volume –

TRADE SHARE ESTIMATE 1995-1996

	SB	NB	SB + NB
%	15.3%	27.3%	19.4%
Total Vol. (TEU)	3,078,345	1,601,894	4,680,239

Wording should be added to Article 5 that if a consortium does not meet the market share threshold set out in Article 5 the consortium may benefit from the exemptions in Article 3 still if it fulfils Section 9 of the Competition Act 1998. There is no sector specific advice for shipping consortia in the application of Section 9 in the draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements that the CMA is currently consulting on. Therefore having reference in the CBEO to the applicability of the exemption would provide clarity and be helpful.

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

Theoretically there would be a significant positive impact, for consortia exceeding the market share threshold of 30% on certain trades. If the share was increased these consortia could rely on the block exemption rather than just self-assessment.

In addition, if it is made clear that pure slot charters are not included in market share calculations it will encourage carriers on trades with market shares close to the threshold to allow other carriers (who are not active on the trade) to have a slot charter allowing that slot charterer to serve its global clients.

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

This would have a significant negative impact. If the market share threshold was reduced this could, depending on the magnitude of the reduction, **[confidential]** lead to uncertainty, higher compliance cost and overall making the UK a less desirable place to do business.

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?

Currently the CBER envisages a relatively short contract period and notice period.

Consortia are able to quickly adjust capacity to respond to fluctuations in supply and demand, and make relatively short notice changes to capacity through chartering extra ships (which was done during the COVID-19 pandemic) and adjusting capacity where needed (through blank sailings - which are used for instance due to port delays (in such cases blank sailing is a step to put the schedule back on track) or equipment shortages).

However, overall except for in exceptional circumstances customers wish for certainty over services offered. Often sailing schedules are planned by lines years in advance. This can be because of the level of time and investment needed to plan a global alliance service, for instance this includes negotiating many terminal contracts, making sure that appropriately sized vessels are introduced to the correct loops. The cost of investment in equipment and ships is high and this should be considered too.

Therefore, hypothetically having a longer lock-in period and notice period would be beneficial to consortia. For instance, it may be reasonable, where considerable investment is made by a consortia, for a consortia agreement to expire only on 24 months after a five year initial period has expired.

Policy Question

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

THE Alliance supports this view. This would create legal certainty for the longest period possible.

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

- a) Significant positive impact

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

This would create legal certainty for the longest period possible, and would reduce legal and regulatory costs. It would maintain the UK as a desirable market.

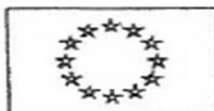
Policy question

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

THE Alliance supports the proposal of having a year long transition period from the CBER to the envisaged CBEO.

THE Alliance in principle agrees that the CMA should have the power to withdraw use of the CBEO in individual exceptional cases that do not fulfil the requirements for benefiting from the block exemption or safe harbours under Section 9 of the Competition Act 1998. THE Alliance strongly agrees that if the CMA is looking to withdraw the use of the CBEO then it should consider the representations made to it by the parties. The timetable of ten working days for parties to provide information is too short. Consortia agreements are international arrangements involving multiple parties. The lines involved are also working in various time zones adding complexity to deadlines. A ten day period is too short a period to gather meaningful information. The CMA should consider more generous time periods for instance thirty working days to respond to an initial request from the CMA and thirty working days to respond to any provisional findings of the CMA.

Annex 1 – Guidance on how to calculate trade share



EUROPEAN COMMISSION
DIRECTORATE-GENERAL IV - COMPETITION

Transport Unit
Head of Unit

Brussels,
DW
IV-D-2

Marjorie Holmes
Davies Arnold Cooper
6-8 Bouverie Street
London EC4Y 8DD

Fax:(+0044 171) 936 2020

Subject:
Your ref: 101/1193.11/gb459

Dear Ms Holmes

Thank you for your letter dated 7 December 1995 addressed to David Wood.

I confirm that on the basis of the information supplied in your letter (as summarised below), the Consortium has a trade share of 19.4% and accordingly appears to satisfy the trade share condition of Article 6 (1) of Regulation No 870/95.

Yours sincerely

Serge Durande

TRADE SHARE ESTIMATE 1995-1996

	SB	NB	SB + NB
%	15.3%	27.3%	19.4%
Total Vol. (TEU)	3,078,345	1,601,894	4,680,239