

# UK competition law: Liner Shipping Consortia Block Exemption

**Provisional decision**

17 November 2023



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# 1. Summary

- 1.1 On 19 January 2023, the Competition and Markets Authority (CMA) published a document seeking views on a proposal to recommend to the then Secretary of State for Business, Energy and Industrial Strategy<sup>1</sup> that she replace the retained Liner Shipping Consortia Block Exemption Regulation (the 'Retained CBER') when it expires on 25 April 2024 with a Liner Shipping Consortia Block Exemption Order (UK CBEO).<sup>2</sup>
- 1.2 Following this consultation and in light of further assessment conducted by the CMA, the CMA no longer proposes to recommend replacement of the Retained CBER. The CMA's provisional decision is not to recommend the making of a new block exemption to replace the Retained CBER when it expires on 25 April 2024. Sections 7 to 10 explain the reasons for the CMA's provisional decision. This document invites feedback on the CMA's provisional decision before it reaches a final decision.

## About this Consultation

- 1.3 This document has the following structure:
- Section 2 provides a high-level overview of the relevant statutory background and the CMA's review of the Retained CBER.
  - Section 3 summarises the responses the CMA received to its consultation.
  - Section 4 provides background on the liner shipping industry and consortia agreements.
  - Section 5 explains how horizontal cooperation in the supply of liner shipping services has developed over time.
  - Section 6 explains the background to the Retained CBER, including the rationale for its introduction and amendment made over time

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<sup>1</sup> In February 2023, BEIS was split to form the Department for Business and Trade (DBT), the Department for Energy Security and Net Zero (DESNZ) and the Department for Science, Innovation and Technology (DSIT). The relevant Secretary of State is now the Secretary of State for Business and Trade.

<sup>2</sup> Regulation 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions, and concerted practices between liner shipping companies (consortia). The Retained CBER is one of the 'retained exemptions' from EU law that was retained in UK law after EU law generally ceased to have effect in the UK on 1 January 2021, as a result of a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

- Section 7 to 10 explain the reasons for the CMA's provisional decision not to recommend the replacement of the Retained CBER with a UK CBEO.

## Consultation process

- 1.4 We are publishing this document in order to consult on our provisional decision. Responses to this consultation should be sent by email to the address provided below. Please provide supporting evidence or examples for your views, where possible.
- 1.5 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 1.6 In accordance with our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. **If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive.**
- 1.7 Further details on the Government's consultation principles and the CMA's use of personal data are included in Annex A of this document.
- 1.8 The consultation will run from **Friday 17 November to Friday 15 December 2023**. Responses should be submitted by email by **5:00 p.m. on Friday 15 December 2023** and should be sent to: [cberreview@cma.gov.uk](mailto:cberreview@cma.gov.uk)
- 1.9 Following this consultation, the CMA will make a final decision on whether or not to make a recommendation to the Secretary of State to replace the Retained CBER with a UK CBEO when it expires, and publish its decision. The CMA will also publish the responses received during the consultation (with any confidential information redacted).

## 2. Introduction

### The Chapter I prohibition

- 2.1 The Competition Act 1998 (CA98) prohibits anticompetitive agreements between 'undertakings' (eg businesses). This prohibition is known as the Chapter I prohibition.<sup>3</sup>
- 2.2 The Chapter I prohibition applies to agreements and concerted practices between undertakings and to decisions by associations of undertakings (eg trade associations) which have as their object or effect the prevention, restriction, or distortion of competition within the UK.

### Individual exemption

- 2.3 There are many situations where agreements that restrict competition can, on balance, be beneficial to consumers. For this reason, the CA98 provides that agreements can be exempted from the Chapter I prohibition if they meet certain conditions relating to the benefits they produce.
- 2.4 Section 9(1) CA98 sets out the conditions that must all be met for an agreement to benefit from individual exemption from the Chapter I prohibition (the 'Section 9 exemption'). Broadly, the agreement must contribute to clear efficiencies. Second, it must provide a fair share of the resulting benefits to consumers. Third, the restrictions on competition that it provides for must be no more than the minimum that is necessary to enable consumers to gain these benefits. Fourth, it must not give the parties to the agreement the opportunity to eliminate competition from a substantial part of the relevant market.<sup>4</sup>
- 2.5 Businesses may assess that a particular agreement does not restrict competition and falls outside of the Chapter I prohibition. Alternatively, they may assess that even where an agreement does restrict competition, it is nevertheless exempt on an individual basis, applying the conditions set out

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<sup>3</sup> The Chapter I prohibition is set out at section 2 CA98.

<sup>4</sup> The cumulative conditions in section 9(1) CA98 that must be met in full are that the agreement:

(a) Contributes to:

(i) improving production or distribution, or  
(ii) promoting technical or economic progress

(b) while allowing consumers a fair share of the resulting benefit; and

(c) does not:

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or  
(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

above. The process by which businesses consider the application of the Chapter I prohibition and the conditions for individual exemption is often referred to as ‘self-assessment’.

## **Block exemption**

2.6 A ‘block exemption’ exempts whole categories of agreements on the basis that agreements within that category would, if assessed individually, be likely to be treated as exempt. If an agreement meets the conditions set out in a block exemption, it is automatically exempt.

## **Retained CBER**

2.7 The Retained CBER is a block exemption made by the European Commission in the period when the UK was a member state of the European Union (EU). It was retained in UK law following the UK’s withdrawal from the EU at the end of the Transition Period.<sup>5</sup>

2.8 The Retained CBER sets out an automatic exemption from the Chapter I prohibition for certain types of agreements between liner shipping companies offering international liner shipping services from or to one or more ports in the UK. Further details on consortia agreements and the Retained CBER are included in the following section.

## **The CMA’s review of the Retained CBER**

2.9 The Retained CBER is due to expire on 25 April 2024.

2.10 Under section 6(1) of the CA98, the CMA may recommend to the Secretary of State that she makes a block exemption. The Secretary of State may give effect to the CMA’s recommendation by making an Order (either in the form in which the CMA makes the recommendation or subject to such modifications as the Secretary of State considers appropriate).<sup>6</sup>

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<sup>5</sup> The Retained CBER was subject to certain amendments under the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

<sup>6</sup> Section 6(2) of the Competition Act 1998. Where the Secretary of State makes such an order, it is laid before Parliament and subject to the negative resolution procedure. The negative resolution procedure means that the block exemption order becomes law on the day signed by the Secretary of State, and remains law unless a motion to reject it is agreed by either the House of Commons or the House of Lords within 40 sitting days.

- 2.11 The CMA launched a review of the Retained CBER in August 2022, with a view to deciding whether to recommend to the Secretary of State that she make a new UK CBEO to replace the Retained CBER.<sup>7</sup>
- 2.12 In January 2023, the CMA consulted on a proposal to recommend the replacement of the Retained CBER with a UK CBEO. The CMA received ten responses to this consultation. Further detail on the views and evidence the CMA received in response to this consultation is included in section 3 below.

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<sup>7</sup> The Retained CBER was a regulation made by the European Commission. UK block exemptions are made by the Secretary of State under powers conferred on them by the Competition Act 1998 to make a 'block exemption order'. Therefore, whereas the retained EU block exemptions are referred to as 'block exemption regulations', block exemptions made under UK law are referred to as 'block exemption orders'.



### 3. Consultation responses

3.1 As noted at paragraph 2.12 above, the CMA consulted in January 2023 on a proposal to recommend to the then Secretary of State for Business, Energy and Industrial Strategy that the Retained CBER should be replaced with a UK CBEO, made using their powers under the CA98.

#### Summary of feedback received

3.2 The CMA received 10 responses to the consultation:

*Table 1: Respondents to the CMA's January 2023 consultation*

<b>Respondent</b>	<b>Role in supply chain</b>
<b>British International Freight Association</b>	Trade association representing freight forwarders
<b>British Chambers of Commerce</b>	A network and representative group for British businesses
<b>British Ports Association</b>	A trade association for British port authorities and operators.
<b>DP World</b>	Operator of ports in the UK, including Southampton and London Gateway
<b>Global Shippers Forum</b>	Trade association for cargo owners
<b>Hutchison Ports</b>	Operator of ports in the UK, notably Felixstowe
<b>Logistics UK</b>	Trade association representing businesses engaged in logistics
<b>Members of THE Alliance</b>	THE Alliance is an East-West consortia shipping alliance <sup>8</sup>
<b>UK Chamber of Shipping</b>	Trade association representing liners

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<sup>8</sup> The response was submitted on instructions of the four members of THE Alliance: Hapag-Lloyd, HMM, Ocean Network Express and Yang Ming.

<b>World Shipping Council ('WSC'), International</b>	WSC is a trade association for the liner shipping industry
<b>Chamber of Shipping ('ICS') and the Asian Shipowners' Association ('ASA')</b>	ICS is a trade association for shipowners and operators.  The ASA is a trade association for shipowners in Asia.

- 3.3 We refer in further detail to the feedback received in setting out our provisional view on whether the Retained CBER should be replaced in sections 8 and 9 below. However, there were in summary three broad categories of feedback.
- 3.4 First, some respondents expressed support for the continuation of a block exemption through its renewal in the form of a new UK CBEO. Reasons given in support of a new UK CBEO included:
- (a) Consortia produce significant efficiencies, of which consumers enjoy a fair share of the benefit.<sup>9</sup>
  - (b) A UK CBEO would encourage the use of consortia agreements by providing greater legal certainty on the application of competition law and reducing the potential compliance costs compared to a self-assessment under the Chapter I prohibition.<sup>10</sup>
  - (c) The current Retained CBER allows smaller liners in the market to compete with the largest – these liners would not individually be able to run services across trades with any regularity.<sup>11</sup>
  - (d) There is a benefit in alignment with the EU antitrust rules.<sup>12</sup> Alignment would avoid deep-sea routes calling only at EU ports, in order to avoid higher compliance burdens with operating in the UK.<sup>13</sup>
- 3.5 Some respondents were neutral on whether the Retained CBER should be continued or expressed mixed views over the recommendation that the CMA

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<sup>9</sup> Response to the consultation submitted on 23 February 2023 on behalf of WSC, ICS, ASA ('Response from WSC, ICS, ASA'); Response to the consultation submitted on 23 February by the British Chambers of Commerce. Response to the consultation submitted on 23 February 2023 on behalf of THE Alliance ('Response from THE Alliance'); Response to the consultation submitted by the UK Chamber of Shipping.

<sup>10</sup> Response from THE Alliance; Response from WSC, ICS, ASA,

<sup>11</sup> Response from THE Alliance.

<sup>12</sup> Response from the British Ports Association. Response from DP World.

<sup>13</sup> Response from WSC, ICS, ASA.

should make. One respondent said that the number of liners covered by the Retained CBER had reduced, and that the absence of a block exemption would not prevent consortia agreements being entered into.<sup>14</sup> One respondent proposed alternative systems of regulation, such as replacing the Retained CBER with some form of industry ombudsman, the formation of a 'specific maritime team within the CMA,' or setting a requirement for an annual report to the CMA by each shipping line claiming use of the block exemption.<sup>15</sup>

3.6 Third, some respondents were opposed to the CMA's proposal, and considered that the Retained CBER should be allowed to lapse. Reasons given for not replacing the Retained CBER included:

- (a) The Retained CBER has failed to deliver benefits to customers.<sup>16</sup>
- (b) The Retained CBER allows more scope for cooperation between competing liners than is necessary, including via the exchange of commercially sensitive information, and changes in the structure of the market increase the risks that competition is restricted.<sup>17</sup>
- (c) A significant portion of the consortia operating on trades to or from Europe exceed the 30% market share threshold set by the Retained CBER, demonstrating that the compliance costs of self-assessment are manageable and that removal of the Retained CBER would not jeopardise the formation of consortia.<sup>18</sup>

3.7 These concerns have led the CMA to conduct further analysis of the functioning of the block exemption.

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<sup>14</sup> Response to the consultation submitted on 23 February 2023 on behalf of Hutchison Ports.

<sup>15</sup> Response to the consultation submitted on 22 February 2023 on behalf of BIFA ('Response from BIFA').

<sup>16</sup> Response to the consultation submitted on 23 February 2023 on behalf of GSF ('Response from GSF').

<sup>17</sup> Response from BIFA; response from GSF.

<sup>18</sup> Response from GSF.

## 4. Liner shipping and consortia

### Liner shipping

- 4.1 In this document, ‘liner shipping’ refers to regular and scheduled cargo transport on specific maritime routes.<sup>19</sup> Liner shipping companies, also known as ‘liners’ or ‘carriers’, are the companies that provide these services. A substantial majority of liner shipping services (in terms of vessel tonnage) involve container ships. Vessels used for wheeled (ro-ro<sup>20</sup>), specialised, and general cargo may also be used for liner shipping.<sup>21</sup>
- 4.2 Liner shipping is one part of a wider supply chain. Other relevant participants in this supply chain include:
- (a) ‘Shippers’ who own the cargo being transported within the containers.
  - (b) ‘Freight forwarders’ who are contracted by shippers to organise the transportation of their goods across the supply chain.
  - (c) ‘Port operators’ who provide services such as the handling of cargo.
  - (d) ‘Logistics providers’ who transport containers from ports to their final destinations, for instance, by train or by road.
- 4.3 Liner shipping services rarely operate between just two ports. Typically, a service will stop in a sequence (or ‘string’) of different ports to load and offload containers. For example, a typical scheduled liner service between northern Europe and East Asia (using a fleet of 11 to 12 container vessels with 16,000 – 24,000 TEU capacities) can provide weekly calls at, on average, four European ports and six Asian ports.<sup>22</sup> Each stop is referred to as a ‘port call’.
- 4.4 Direct liner shipping services do not operate between all container ports. Where two ports do not benefit from a direct service, a container may need to be transported via one or more intermediate ports. Offloading a container at an intermediate port, before reloading onto a different vessel to reach its final

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<sup>19</sup> Article 2(2) of the Retained CBER defines liner shipping as ‘*the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an occasional basis, to any transport user against payment*’.

<sup>20</sup> Roll-on/roll-off.

<sup>21</sup> Data taken from Equasis (2021) “The 2021 World Merchant Fleet”, p8; categories for the liner shipping fleet taken from OECD (2015), “[Competition Issues in Liner Shipping](#)”, p5.

<sup>22</sup> See Theo Notteboom and Jean-Paul Rodrigue (2023) “Maritime container terminal infrastructure, network corporatization, and global terminal operators: Implications for international business policy,” *Journal of International Business Policy* 6.1, pp67 – 83, here p69.

destination is referred to as ‘transshipment’. Certain ports act as transshipment ‘hubs’, specialising in this process.<sup>23</sup>

- 4.5 Containerised shipping services have underpinned the development of modern global supply chains, with the first transatlantic container lines servicing the UK launched in 1966.<sup>24</sup> Global container port throughput grew from 36 million twenty-foot equivalent units (TEU) in 1980 to 866 million TEU in 2022.<sup>25</sup> The growth in container throughput has been accompanied by growth in the average size of vessels. The capacity of the largest container ships more than doubled in size during 2006 to 2022.<sup>26</sup>

## Position of the UK in global shipping networks

- 4.6 The UK is well-integrated within global liner shipping networks, receiving 61,778 tons of container traffic in 2022.<sup>27</sup> The UN Committee on Trade and Development’s (UNCTAD) Liner Shipping Connectivity Index (LSCI) ranks the UK as the ninth-best connected country as of Q2 2023.<sup>28</sup> Three of the UK’s ports also rank within the top 100 best connected globally: Felixstowe (36), Southampton (42), and London Gateway (51).<sup>29</sup> The connectivity of the UK and its major container ports has remained relatively stable over the past decade, with the exception of London Gateway replacing the Port of Tilbury as the UK’s third most well-connected port since its opening in 2013.<sup>30</sup>
- 4.7 As of September 2022, 91 services operated by liners made calls at UK ports, with 32 of these via consortia.<sup>31</sup> The total capacity in TEU of liner services reaching UK ports as of September 2022 stood at 412,830, with around 70%

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<sup>23</sup> For example, of the 59.4 million TEUs handled by ports around the Strait of Malacca (primarily Singapore and Tanjung Pelepas) about 80% strictly involve transshipment cargo; see Theo Notteboom and Jean-Paul Rodrigue (2023) "Maritime container terminal infrastructure, network corporatization, and global terminal operators: Implications for international business policy," *Journal of International Business Policy* 6.1, pp67 – 83.

<sup>24</sup> Daniel M. Bernhofen, Zouheir El-Sahli, Richard Kneller (2013). "Estimating the Effects of the Container Revolution on World Trade", *CESifo Working Paper No. 4136*, p12.

<sup>25</sup> Figures taken from [Statista](#).

<sup>26</sup> UNCTAD (2022) *Review of Maritime Transport 2022*, p138.

<sup>27</sup> This is 12% higher than tonnage received in 2012. Figures taken from the Department for Transport’s [Port and domestic waterborne freight statistics \(PORT\)](#).

<sup>28</sup> UNCTAD’s LSCI measure how well-connected countries are to global shipping networks based on the status of their maritime transport sector. The LSCI takes into account the number of shipping lines servicing a country; the size of the largest vessel used on these services (in TEU); the number of services connecting a country to the other countries; the total number of vessels deployed in a country; and the total capacity of those vessels, in twenty-foot equivalent units (TEU).

<sup>29</sup> Q2 2023 UNCTAD LSCI figures, accessible [here](#).

<sup>30</sup> The Port of Tilbury’s place in UNCTAD LSCI rankings has declined from 108 in Q2 2014 to 201 in Q2 2023.

<sup>31</sup> RBB Economics (2022) *Liner Shipping Consortia Block Exemption Regulation: an introductory note prepared at the request of the World Shipping Council*, p10.

of this capacity attributable to services provided under consortia agreements.<sup>32</sup>

Figure 1: UNCTAD LSCI rankings of UK and major UK ports, 2014 - 2023

Year (all Q2)	UK	Felixstowe	Southampton	London Gateway
2014	10	29	45	127
2015	7	25	40	117
2016	7	28	41	133
2017	7	25	31	75
2018	7	28	36	66
2019	8	33	41	34
2020	10	33	38	44
2021	9	35	34	36
2022	6	35	34	38
2023	9	36	42	51

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<sup>32</sup> RBB Economics (2022) *Liner Shipping Consortia Block Exemption Regulation: an introductory note prepared at the request of the World Shipping Council*, p10.

## 5. Developments in horizontal agreements in liner shipping and the application of competition law to them

5.1 The forms of horizontal cooperation between suppliers of liner shipping have developed over time as has the application of antitrust law to those different forms of cooperation.<sup>33</sup>

### Liner shipping conferences

5.2 Developed by liners in the 1870s to manage the transformative impact of steamships and to control capacity, the conference system was characterised by the agreement of common freight rates between liners.<sup>34</sup> Conferences were organised in a variety of ways, and also featured sailing quotas, revenue pooling, and port allocation.<sup>35</sup> Conferences were the predominant form of cooperation between liners until relatively recently: as late as the 1990s, conferences accounted for 60% of capacity in the major trades and 150 conferences were still in operation in 2001.<sup>36</sup>

5.3 Liner shipping conferences were historically granted certain exemptions from competition law. In 1986, the EU adopted the Liner Conference Block Exemption Regulation 4056/86 which allowed liner shipping firms to, among other things, form agreements which involved price fixing and capacity regulation.<sup>37</sup> This block exemption was justified on the grounds that collective rate-setting and other conference activities led to stable freight rates, which in turn offered reliable scheduled maritime transport services to shippers.<sup>38</sup>

5.4 The conference system came under increased antitrust scrutiny in the late 1990s and early 2000s.<sup>39</sup> Following a review launched in 2003, the block

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<sup>33</sup> As noted above, the Retained CBER is one of the 'retained exemptions' from EU law that was retained in UK law after EU law generally ceased to have effect in the UK on 1 January 2021. This section therefore focuses on developments in the application of EU antitrust competition law to liner shipping agreements.

<sup>34</sup> UNCTAD (2016) "[Liner Shipping: is there a Way for More Competition?](#)", p3; see also Chiang Hai Ding. "The Early Shipping Conference System of Singapore, 1897-1911." *Journal of Southeast Asian History* 10.1 (1969) pp50–68, here pp54 – 56.

<sup>35</sup> William Sjostrom (2009) "Working Paper: Competition and Cooperation in Liner Shipping", pp1-2.

<sup>36</sup> OECD (2002) "[Competition Policy in Liner Shipping: Final Report](#)", p18; William Sjostrom (2004) "Ocean Shipping Cartels: A Survey" *Review of Network Economics* 3.2, pp107 – 134.

<sup>37</sup> This followed on from Regulation 954/79 (1979) which facilitated the ratification or accession by EU Member States to the [United Nations Convention on a Code of Conduct for Liner Conferences](#) (1974). On the Code of Conduct, see UNCTAD (2016) "[Liner Shipping: is there a Way for More Competition?](#)", pp5-6, and OECD (2015), "[Competition Issues in Liner Shipping](#)", p16.

<sup>38</sup> See European Commission press release [here](#).

<sup>39</sup> The OECD's 2002 report ("[Competition Policy in Liner Shipping](#)") called for the removal of the anti-trust exemption for price fixing and rate discussions, and was credited by the European Union as part of the background to the review that led to the abolition of the conference block exemption regulation. The United States Ocean Shipping Reform Act (1998) was also influential.

exemption regulation for conference agreements was repealed in 2006, becoming effective in 2008 following a two-year transitional period.<sup>40</sup> In its final report, the European Commission found no causal link between price fixing and reliable liner shipping services, and estimated that a repeal of the exemption would improve service quality, and lead to a moderate drop in prices and considerable reductions in charges and surcharges.<sup>41</sup>

## Consortia agreements

- 5.5 Following the advent and rapid adoption of containerisation in the 1960s and 1970s, liners increasingly opted for other forms of horizontal cooperation, particularly consortia agreements, which aimed at managing the costs of increasingly large vessels, new forms of container-based service, and the 'just-in-time' logistical demands of major shippers, who required frequent and reliable services.<sup>42</sup>
- 5.6 Consortia agreements are typically more flexible than conference arrangements, do not involve the fixing of prices, and can take on a variety of forms depending on the requirements of the specific trade.<sup>43</sup> Liners typically enter into several separate consortia agreements.
- 5.7 The European Commission first adopted a consortia block exemption regulation in 1995 by Regulation 870/95. A report prepared for the European Commission in 1990 advocated for the creation of what would become the EU CBER, noting that whereas conferences were essentially preoccupied with ensuring members charged the same freight rates, consortia agreements were more concerned with schedule rationalisation and other capacity management techniques that went beyond the exemption set out in the existing block exemption for liner conferences.<sup>44</sup> Further details on more recent reviews of the EU CBER are included in the following section.

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<sup>40</sup> European Commission (2006) *Competition: repeal of block exemption for liner shipping conferences*.

<sup>41</sup> European Commission (2004) *White Paper on the review of Regulation 4056/86, applying the EC competition rules to maritime transport*; European Commission (2005) *Commission Staff Working Document; Annex to the Proposal for a Council Regulation repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services*; See also UNCTAD (2016) "[Liner Shipping: is there a Way for More Competition?](#)", p12.

<sup>42</sup> See European Commission press release [here](#). See also René Taudal Poulsen (2010). "The Emergence of New Organisational Forms in Liner Shipping: Swedish Liner Shipping and International Consortia, 1960–75". *The Journal of Transport History*, 31(1), pp69–88; OECD (2015), "[Competition Issues in Liner Shipping](#)", p5, p27.

<sup>43</sup> OECD (2002) "Regulatory issues in International Maritime Transport", p18.

<sup>44</sup> European Commission (1990) *Report on the possibility of a group exemption for consortia agreements in liner shipping. Communication by the Commission. Proposal for a Council Regulation (EEC) on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between shipping companies*, pp10-11.



- 5.8 In consortia, liner shipping companies offer a joint service. Article 2(1) of the Retained CBER defines a consortium as an agreement or a set of interrelated agreements between two or more vessel-operating liners which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements.
- 5.9 Recital 3 to the Retained CBER sets out that consortia agreements vary significantly, ranging from those that are highly integrated, and which require a high level of investment (such as the purchase or charter by their members of vessels specifically for the purpose of setting up the consortium and the setting up of joint operations centres), to flexible slot exchange agreements. For the purposes of the Retained CBER, a consortia agreement consists of one, or a set of, separate but interrelated agreements between liner shipping companies under which the parties operate the joint service.
- 5.10 The Retained CBER is a sector-specific block exemption, setting out an automatic exemption from the Chapter I prohibition (subject to meeting specific conditions) for certain agreements between liner shipping companies offering international liner shipping services from or to one or more ports in the UK.<sup>45</sup>
- 5.11 This exemption applies if the combined market share of the parties to a consortia agreement does not exceed 30% on the relevant market upon which the consortium operates.<sup>46</sup> The exemption does not apply to a consortia agreement if its direct or indirect object is the fixing of prices of service to customers, limitation of capacity or sales, or the allocation of markets or customers.<sup>47</sup>
- 5.12 The Retained CBER is due to expire on 25 April 2024.

## Alliances

- 5.13 Alliances between liners emerged in the 1990s and are a major feature of the industry. As opposed to consortia operating on single trade routes, alliances focus on liner shipping services as a whole, and cover multiple trades. Alliances do not involve price fixing, joint ownership of assets, pooling of

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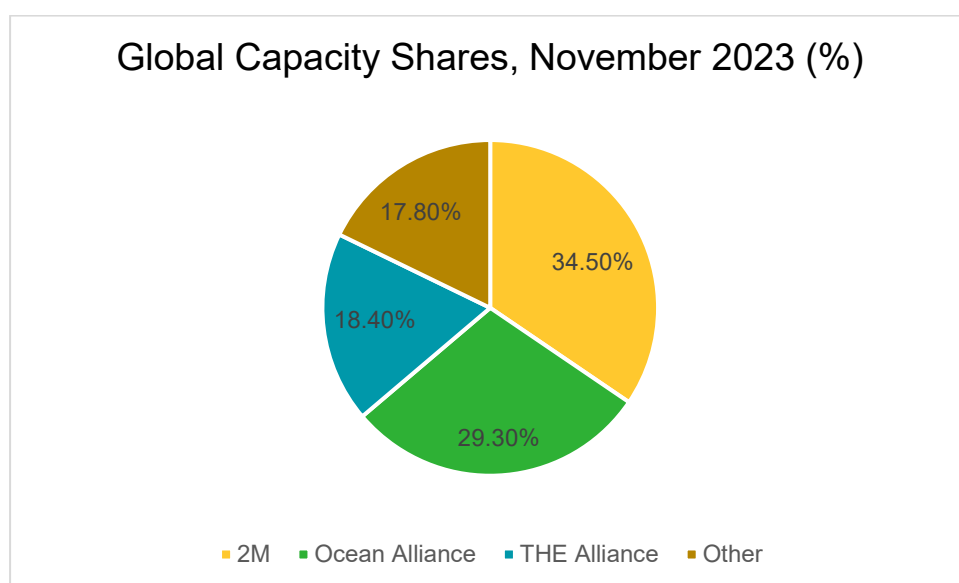
<sup>45</sup> Retained CBER, Article 2(1).

<sup>46</sup> Retained CBER, Article 5.

<sup>47</sup> Retained CBER, Article 4.

revenues or the sharing of profits or losses.<sup>48</sup> Alliances instead focus on the sharing and coordination of vessels on a global scale in order to support broader service coverage and to derive benefits from increased operational efficiencies.<sup>49</sup> Therefore, alliances can be seen as a ‘bundle of consortia’ operating globally across multiple trade routes.<sup>50</sup>

- 5.14 The makeup of the major global alliances has shifted repeatedly since the 1990s, as global capacity has become increasingly dominated by the largest liners. Members of the ‘fourth generation’ of alliances (2M, Ocean and THE Alliance) account for around 82.2% of global container capacity,<sup>51</sup> and around 94% of total capacity on Far East – West trade lanes.<sup>52</sup> This contrasts with the situation before 2015, where all alliances had a combined market share below 50% on the four main East – West routes involving Europe.<sup>53</sup>



- 5.15 Liners participating in alliances also participate in other forms of horizontal cooperation. For instance, an alliance member may participate in a consortia agreement with another liner. In some cases, a member of one alliance may participate in a consortia agreement with a liner which is a member of another alliance. Consortia agreements may therefore act as ‘bridges’ between

<sup>48</sup> OECD (2015) “[Competition Issues in Liner Shipping](#)”, p28.

<sup>49</sup> International Transport Forum (2018) “[The Impact of Alliances in Container Shipping](#)”, p10.

<sup>50</sup> ITF (2022) “[Performance of Maritime Logistics](#)”, *International Transport Forum Policy Papers, No. 106*, p32.

<sup>51</sup> Alphaliner Top 100, as of 15 November 2023, which gives share of TEU capacity on board operated ships based on existing fleet and orderbook. The proposed P3 Alliance between MSC, CMA-CGM, and Maersk failed to receive regulatory approval in China in 2014 but presaged the creation of the 2M Alliance of Maersk and MSC, which is now set to be discontinued by January 2025; see ITF (2018) “[The Impact of Alliances in Container Shipping](#)”, pp14 – 15; Matthew Drenan (2015) “Watchdogs of the World: Global Liner Conference Regulators in the Modern Shipping Market and Why the P3 Agreement Failed” *24 Mich. St. Int’l L. Rev.*, pp79-109.

<sup>52</sup> RBB Economics (2022) *Response to the EC liner shipping CBER consultation*, p38.

<sup>53</sup> These routes are North Europe, Asia-Med, North Europe-North America East Coast and Med-North America East Coast). See ITF (2019) “[Container Shipping in Europe Data for the Evaluation of the EU Consortia Block Exemption](#)”, p5.

alliances. As of 2021, around 13% of consortia were inter-alliance agreements.<sup>54</sup>

- 5.16 The current generation of alliances has been described as ‘fundamentally different’ from earlier iterations, with no liner dominant in any of the three alliances.<sup>55</sup> This followed a key transitional period after 2012, in which the largest liners also entered into alliance agreements in the context of industry-wide acquisitions of smaller liners as well as orders of larger ships of over 20,000 TEU capacity.<sup>56</sup>
- 5.17 Of the ten largest liners by capacity share, only ZIM is not currently a member of one of the three global alliances.<sup>57</sup>

## Slot charter agreements

- 5.18 Slot charter agreements represent a simpler form of horizontal agreement between liners. In slot charter agreements, a liner purchases slots for containers on a vessel of another liner, or exchanges slots on its own vessels, in return. These agreements do not normally involve joint decision-making concerning marketing, ports of call, schedules, or the use of the same port terminals, and do not rationalise or improve a given service. Slot-charter agreements are not covered by the Retained CBER.<sup>58</sup>

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<sup>54</sup> ITF (2022) “[Performance of Maritime Logistics](#)”, *International Transport Forum Policy Papers*, No. 106, p32; Olaf Merk and Antonella Teodoro (2022) “Alternative approaches to measuring concentration in liner shipping”, *Maritime Economics & Logistics*, pp723–746, here pp737 – 738.

<sup>55</sup> ITF (2018) “[The Impact of Alliances in Container Shipping](#)”, p15.

<sup>56</sup> OECD/ITF (2015) “[The Impact of Mega-Ships](#)”, pp20 – 22; ITF (2018) “[The Impact of Alliances in Container Shipping](#)”, pp14-15.

<sup>57</sup> Alphaliner Top 100, as of 25 October 2023.

<sup>58</sup> See European Commission (2019) *Commission Staff Working Document Evaluation of the Commission Regulation (EC) No 906/2009 of 28 September 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)*, p6, footnote 23.

## 6. The objectives and recent reviews of the CBER

- 6.1 The Retained CBER was first adopted by the European Commission in 2009,<sup>59</sup> and was renewed without amendment in 2014 and 2020.<sup>60</sup>
- 6.2 On 31 December 2020, the EU CBER was retained into UK law following the UK's departure from the EU, subject to certain amendments.
- 6.3 In October 2023, the European Commission announced its decision not to extend the EU CBER, and that the EU CBER would therefore expire on 25 April 2024.<sup>61</sup> Alongside this announcement, the European Commission published a report following its evaluation of the EU CBER in the form of a 'Staff Working Document', reflecting the findings and views of the European Commission's staff (and not necessarily reflecting the formal position of the European Commission itself).<sup>62</sup>

Table 2: Developments in the CBER

Developments in the CBER	Date
<b>Initial CBER (Reg No 870/1995) introduced by European Commission</b>	1995
<b>Second CBER (Reg No 823/2000) introduced by European Commission</b>	2000
<b>CBER renewed by European Commission with minor changes</b>	2005
<b>Current EU CBER (Reg No 906/2009) adopted by European Commission</b>	2009
<b>EU CBER reviewed by European Commission and renewed without change</b>	2014

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<sup>59</sup> CBER replaced Block Exemption Regulation 823/2000 on maritime consortia, which had been renewed in 2005. The first Consortia Block Exemption Regulation, Commission Regulation 870/95, was adopted in 1995. For the differences between Regulation No 906/2009 and earlier iterations of the CBER, see the overview provided [here](#).

<sup>60</sup> See press notice [here](#).

<sup>61</sup> European Commission (2023) *Communication to the Commission on the Expiry of Commission Regulation (EC) No 906/2009 of 28 September 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)* (2023) 6700. ('Communication to the Commission of 10 October 2023 on the expiry of the CBER').

<sup>62</sup> European Commission (2023) *Commission Staff Working Document Evaluation of Commission Regulation (EC) N° 906/2009 of 28 September 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)* ('EC 2023 SWD').

<b>EU CBER reviewed by European Commission and renewed without change</b>	2020
<b>EU CBER retained into UK law via the European Union (Withdrawal) Act 2018, in amended form.<sup>63</sup></b>	31 December 2020
<b>European Commission decision to allow the EU CBER to lapse upon its expiry on 25 April 2024</b>	10 October 2023

## **The European Commission’s original rationale for the CBER**

6.4 The European Commission adopted the EU CBER for the general objective of protecting effective competition in the liner shipping sector, by promoting economically desirable cooperation between liners. The European Commission’s general objective was based on an assessment of the beneficial effects of consortia:

- (a) The European Commission considered that consortia generally helped to improve the productivity and quality of liner shipping services by reason of the rationalisation they brought to the activities of their members, and through the economies of scale they allowed in the operation of vessels and the utilisation of port facilities.
- (b) The European Commission considered that consortia facilitated and encouraged greater utilisation of containers and more efficient use of vessel capacity, which benefited users in the form of an improvement in the frequency of sailings and port calls, or an improvement in scheduling as well as better quality and personalised services, provided that consortia were subject to sufficient external competition.
- (c) The European Commission considered that consortia had a role in preventing the creation of oligopolistic market structures. When the current EU CBER was adopted in 2009, the liner shipping sector was considered to be relatively fragmented with low levels of concentration on both a global scale and also on a trade-by-trade basis. It was considered that only a limited number of individual liners had the financial resources to bear the upfront investment for the acquisition of larger, more efficient vessels and had the route coverage to maintain a sufficiently high utilisation rate. Consortia between small and medium-sized liners were

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<sup>63</sup> The amendments were made by the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

seen as a way for them to compete with larger liners, and were considered indispensable to allow smaller liners to compete on Far East-Europe trades. The European Commission also considered that small and medium-sized liners without strong financial resources were particularly vulnerable to fluctuating levels of demand if operating on a stand-alone basis.

6.5 In the context of the general objective, the European Commission adopted the EU CBER with the specific objectives of:

- (a) providing legal certainty to liners, in particular small and medium-sized ones, on the assessment of cooperation under Article 101 Treaty on the Functioning of the European Union ('Article 101 TFEU'), and;
- (b) simplifying administrative supervision by providing a common framework for the European Commission, and competition authorities and national courts within the EU for assessing cooperation between liners under Article 101 TFEU.

### **The European Commission's reviews of the EU CBER**

6.6 As noted above, following the adoption of the EU CBER in 2009, the European Commission has carried out three reviews of the EU CBER concluding in 2014, 2019 and in 2023, with the most recent review leading to its decision that the EU CBER should lapse.

6.7 In its most recent review in 2023, the European Commission described the 2014 and 2019 reviews in the following terms:

*'[...] the approach consisted in assuming the causal link between the existence of block-exempted consortia and benefits for the users of their services and assessing whether the market developments over the evaluation period raised any concern that consumers would not benefit from block-exempted consortia any more.*

*As an illustration, for the 2019 evaluation, it was found that the parameters of competition had not deteriorated during the evaluation period, in particular the costs for carriers and prices for customers per TEU had decreased in parallel and the quality of services had remained stable. It was therefore concluded that there was no reason to depart from the longstanding view that consortia were an efficient way for providing and improving liner shipping services that also benefits customers'.*

- 6.8 The European Commission explained that it did not follow the same approach in its review of the CBER over the period from 2020 to 2023, because price increases and service disruptions faced by transport users during this period meant that the benefits of consortia could not be assumed. The European Commission said that it therefore collected evidence covering as comprehensively as possible the criteria for its evaluation of the EU CBER.
- 6.9 As noted above, the European Commission's evaluation of the EU CBER has led it to conclude that the EU CBER '*does not appear to be fit for its purpose anymore*' and that it should therefore be allowed to lapse.<sup>64</sup>
- 6.10 Where aspects of the European Commission's assessment are relevant to the CMA's assessment, these are referred to in the following sections.

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<sup>64</sup> Communication to the European Commission of 10 October 2023 on the expiry of the CBER.

## 7. Framework for the CMA's decision

- 7.1 Following its consultation in January 2023 and in light of the feedback that the CMA received in response to that consultation, the CMA has carried out further assessment and reconsidered whether the Retained CBER should be replaced in the UK.
- 7.2 It is now the CMA's provisional view that the Retained CBER should be allowed to lapse. The CMA's provisional decision is therefore not to recommend replacement of the Retained CBER to the Secretary of State. The CMA's reasons for this provisional decision are set out in the following sections.
- 7.3 To recommend the replacement of the Retained CBER with a UK CBEO, the CMA considers that two broad conditions should be met:

### **Condition 1: Sufficient certainty on the application of the Section 9 exemption**

- 7.4 First, the CMA should have sufficient certainty that consortia agreements are likely to be exempt from the Chapter I prohibition by meeting the conditions of the Section 9 exemption. In broad terms, this involves an analysis of whether consumers benefit from consortia to an extent which outweighs the impact of any restrictions on competition.
- 7.5 It is important to note that lacking sufficient certainty that a category of agreements is likely to benefit from exemption, does not necessarily imply that agreements within the category are unlikely to benefit from exemption on an individual basis.

### **Condition 2: Sufficient benefits brought by a block exemption compared to self-assessment under the CA98**

- 7.6 Second, the CMA should be satisfied that there are sufficient benefits to justify maintaining a block exemption, based on the specific benefits a block exemption would provide, compared to businesses needing to individually assess their agreements against the conditions of the Section 9 exemption.



## 8. Sufficient certainty on the application of the Section 9 exemption

- 8.1 For the Section 9 exemption to apply to a particular agreement, the following conditions must all be fulfilled:
- (a) The agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress. The attainment of these objectives will be referred to as 'efficiencies'.
  - (b) Consumers must receive a fair share of the resulting benefits.
  - (c) The restrictions must be indispensable to the attainment of the efficiencies.
  - (d) The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned.
- 8.2 In considering whether a block exemption should be made, seeking to assess whether each potential consortia agreement would meet the conditions of the Section 9 exemption would not be proportionate. The CMA can, however, make a more general assessment of whether the agreements within the proposed category for exemption are *likely* to be exempt.
- 8.3 Although the assessment will be at a more general level, the broad structure of the assessment will remain the same as for an individual assessment:
- (a) **Effect on competition:** The first step is to consider the effects of consortia on competition and assess the extent to which they restrict competition. Without assessing the potential effects on competition, it is not possible to assess whether the efficiencies outweigh the restrictions.
  - (b) **Efficiencies:** The second step is to consider the efficiencies, and the extent to which these compensate consumers for any restrictions of competition.
- 8.4 The following section sets out in *general* terms the main impacts consortia may have on competition and the main efficiencies to which they may give rise.
- 8.5 Having set out the potential effects of consortia in general terms, the CMA considers whether it has sufficient certainty based on the available information that in practice, these efficiencies outweigh any impacts consortia have on competition, such that a block exemption may be appropriate.

8.6 Where, as is the case with the Retained CBER, stakeholders who are affected by the application of the block exemption express concerns about whether cooperation has delivered benefits, it is appropriate for the CMA to carry out a closer analysis of the evidence bearing on the factors described above.

## **Main potential effects on competition**

8.7 At a general level, consortia will restrict competition to the extent that:

(a) the participating liners would have operated independent services in the relevant market (or would have had the *potential* to do so), and;

(b) in operating independent services, the liners would have more independence on the parameters of competition, compared to within a consortia.<sup>65</sup>

8.8 Consortia that benefit from an exemption under the Retained CBER do not involve the fixing of prices, allocation of markets or customers, or agreements to limit capacity or sales other than in response to fluctuations in supply and demand. These are ‘hardcore restrictions’, the presence of which excludes the application of the exemption under the Retained CBER.

8.9 However, operating within such a consortium will still allow liners to co-ordinate on other aspects of the joint service, which may affect key parameters of competition between the liners. For example, operating a joint service may involve liners co-ordinating on the frequency and timing of sailings, the number of vessels forming part of the joint service on a particular route, as well as the ports at which the service calls.

8.10 Consortia may also have more indirect impacts on competition. In order to implement a joint service, it may be necessary for the participating liners to share information on various aspects of their businesses. This may in certain circumstances artificially increase transparency between competitors and restrict competition by reducing competitive uncertainty in the market.

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<sup>65</sup> In some cases, undertakings enter into horizontal agreements as based on objective factors they would not, in the particular legal and economic context, have been able to carry out the activity covered by the cooperation independently. In these circumstances, such horizontal agreements will generally not give rise to restrictive effects on competition within the meaning of the Chapter I prohibition unless the parties could have carried out the project or activity using a form of cooperation that is less restrictive of competition (see paragraph 3.45 of the CMA’s *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements*).

## Main potential efficiencies

- 8.11 Operating a joint service can in principle give rise to efficiencies. By operating a joint service, a larger number of customers may be available to utilise the capacity on a given vessel. This consolidation of demand may enable the liners to:
- (a) operate larger vessels as part of their joint service in the confidence that their capacity will be used effectively; and
  - (b) use the capacity on their vessels more efficiently.
- 8.12 Both outcomes could potentially lower the costs per unit of cargo transported:
- (a) larger vessels may enjoy scale efficiencies so they can be operated at a lower cost on a per-unit basis; and
  - (b) for any given vessel, the cost per unit of cargo transported will be lower as its capacity is used more efficiently.
- Assuming there is sufficient competition in the market, these cost-savings should then be passed through to consumers in the form of lower prices.
- 8.13 The use of more efficient vessels and the more efficient use of capacity on a given vessel may reduce the fuel used on a per-unit basis. This may result in lower emissions per container, and therefore reduce the environmental impact of each container carried.<sup>66</sup>
- 8.14 The operation of a joint service may allow the liners to call at ports which would, absent a consolidation of demand at those ports, not be cost-effective for either liner to serve on an individual basis.<sup>67</sup> Operating as a joint service rather than individually may therefore expand the range of ports at which services call.
- 8.15 From the perspective of the customer committed to a particular liner and disinclined to switch to alternatives, if their chosen liner forms part of a consortium, then the sailings on which the customer may transport their cargo may effectively expand.
- 8.16 Consortia may also have pro-competitive effects. The economies of scale made possible via operating in consortia may allow smaller liners to compete

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<sup>66</sup> Response from WSC, ICS, ASA, p45; see also UNCTAD (2022) *Review of Maritime Transport 2022*, p108; and International Maritime Organisation (IMO) (2020) *Fourth IMO Greenhouse Gas Study*.

<sup>67</sup> RBB Economics (2022) *Response to the EC liner shipping CBER consultation*, p13.

more effectively against larger liners, and therefore increase competition within a particular market. In addition, consortia may increase competition between liners on price, on the basis that they remove other differentiating features between the services offered by liners.

## **Analysis and evidence**

- 8.17 Paragraphs 8.7 to 8.16 set out in general terms the main effects consortia may potentially have on competition, and the main efficiencies they may potentially give rise to.
- 8.18 The following section concerns whether the CMA has sufficient certainty that - in practice - consumers benefit from efficiencies produced by consortia, which outweigh any restriction of competition. To do so, the CMA has considered the available evidence on the impact the formation of consortia has on:
- (a) The price of liner shipping - paragraphs 8.20 to 8.28.
  - (b) Frequency of services and ports served - paragraphs 8.29 to 8.32.
  - (c) The environmental impact of liner shipping - paragraphs 8.33 to 8.37.
  - (d) The quality of liner shipping services - paragraphs 8.38 to 8.41.
- 8.19 In addition, considering the causal link between consortia and these specific market outcomes, the CMA has also had regard to the following wider market developments and has considered whether they suggest that a case-by-case assessment of the impact of consortia would be more appropriate than trying to assess consortia as a category of agreements:
- (a) Increased concentration in the liner shipping industry - paragraph 8.43; and
  - (b) The trend towards liners participating in markets in a vertical relationship to liner shipping – paragraph 8.44.

### **Price**

- 8.20 The price of liner shipping services increased very significantly during the Covid pandemic. The Shanghai containerized freight index (SCFI), which tracks rates on the major trade routes from Shanghai, stood at 898 points in

December 2019, but had reached 2,455 points by December 2020 and nearly 5,000 by December 2021.<sup>68</sup>

- 8.21 However, by October 2023, the SCFI stood at 918 points, indicative of how freight rates have largely returned to pre-pandemic levels, with sustained and steep month-on-month falls in contracted rates and lower volumes reported on key routes.<sup>69</sup> Spot rates have also fallen considerably: as of 22 June 2023, spot rates on the Shanghai-Rotterdam trade were 86% lower than the equivalent period in 2022, with spot rates on transatlantic routes reported as being 50% lower than pre-pandemic levels by September 2023.<sup>70</sup>
- 8.22 With regard to profitability, liners' earnings before interest and tax during 2022 have been estimated to be \$296.3 billion, a significant increase compared to profits of \$214 billion in 2021 which itself was an unprecedented amount.<sup>71</sup>
- 8.23 Stakeholders representing the users of liners' services have argued that the increases in prices and profit demonstrate that *'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'*.<sup>72</sup> They have also argued that in addition to the increase to freight rates, they also face increased surcharges and fees on independent and smaller operators.<sup>73</sup>
- 8.24 Stakeholders have also highlighted the possibility that the use of larger vessels is not necessarily cost-neutral for other participants in the overall supply chain, and that efficiencies within the liner-shipping leg of the supply chain may be offset by reduced efficiency at ports. Specifically, the CMA was told that the use of larger vessels can increase costs for the ports which service them.<sup>74</sup>

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<sup>68</sup> UNCTAD (2022) *Review of Maritime Transport 2022*, p61.

<sup>69</sup> SCFI as of 20 October 2023; See, for example, *Xeneta* (31 May 2023) "Long-term ocean freight rates collapse by almost 30% in a month as new US contracts reflect market reality"; *The Loadstar* (2 June 2023) "Container freight rates: 'collapse' is the word, says Xeneta".

<sup>70</sup> Drewry (22 June 2023) *World Container Index - 22 Jun*; see also "Carriers run out of niche trades as pressure grows and freight rates tumble" *The Loadstar* (7 June 2023); Mike Wackett (2023) "Asia to Europe spot rate plunge pushes carriers to cancel loops last-minute" *The Loadstar*; Mike Wackett (2023) "'Freefalling' Asia-North Europe rates shed half their value in three weeks" *The Loadstar*.

<sup>71</sup> UNCTAD (2023) *Review of Maritime Transport 2023*, p45.

<sup>72</sup> Global Shippers Forum, European Association for Forwarding, Transport, Logistics and Customs Services (CLECAT), International Federation of Freight Forwarders Associations (FIATA) (2023) "Reasons and Ways to Reform the EU Consortia Block Exemption Regulation (CBER) A Briefing for Policymakers by GSF, CLECAT and FIATA."

<sup>73</sup> Response from BIFA. Stakeholders noted that detention and demurrage charges saw an average increase of 104% between July 2020 to July 2021, to take one example. See also press coverage such as Will Waters (2021) *Demurrage and detention charges double in a year*. *Lloyd's List*.

<sup>74</sup> Hutchison Ports told the CMA *'Port operations have a high degree of fixed costs but an uneven pattern of demand. When there are no ships in port the operator still has to bear a high proportion of normal operating costs. As ships have increased in size so has the scale of port equipment and the level of port resource required to work the largest vessels. However, the total number of ship calls has decreased. This has resulted in greater peaks and troughs of demand and pushed up the unit cost of port operations'*.

- 8.25 Stakeholders representing liners have argued that prices increased during the Covid pandemic due to exogenous factors, such as reductions in liner capacity due to delays at ports, increased fuel cost, and the sudden increase in demand for shipping due to increased e-commerce sales.<sup>75</sup>
- 8.26 Recent price developments do not in themselves indicate whether consumers would face higher or lower prices in a scenario where liners did not operate in consortia. Prices are the product of a range of different factors. To determine what effect consortia have on prices, it would be necessary to separate out the different factors which *potentially* influence prices – including participation in consortia – and identify for each factor its individual effect.
- 8.27 The WSC submitted an econometric report assessing the role consortia played in the increases in the price of liner shipping observed over the pandemic period. The report concludes that the increases in prices were unrelated to the presence of consortia, and that more generally, since 2017 (the start of the observation period for the report), consortia had not had an effect on prices. The econometric report noted that when the model for prices was specified in certain ways, consortia appeared to have a negative effect on prices. In a number of other models, however, consortia were seen to be unrelated to changes in prices, reflecting the conclusions of the report.
- 8.28 The CMA's focus is not on accounting specifically for the role of consortia in the significant prices rises seen in the pandemic. Rather, the CMA's focus is on the impact consortia have on prices more generally. That is, whether consortia have a downward effect on prices (on account of efficiencies) or an upward effect (on account of their impact on competition). The analysis submitted by the WSC does not clearly demonstrate that consortia, in general, will have a downward effect on prices.

### ***Frequency of services and range of port calls***

- 8.29 As explained at paragraph 4.6 above, UNCTAD's LSCI can be used to measure the integration of countries within global liner shipping networks. Stakeholders representing liners refer to the UK's LSCI score having grown around 20% in the ten years between 2012 and 2022, and said that consortia are likely to contribute to a high LSCI score through more frequent scheduled ship calls, more liners providing services, and larger average vessel sizes.<sup>76</sup>

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<sup>75</sup> Response from WSC, ICS, ASA, pp36–37; RBB Economics (2023) *Liner shipping consortia: Assessment of freight rate developments: Prepared for World Shipping Council*, pp8-17.

<sup>76</sup> RBB Economics (2022) *Liner Shipping Consortia Block Exemption Regulation: an introductory note prepared at the request of the World Shipping Council*, pp9–10.

- 8.30 Stakeholders representing liners' customers, in contrast, have submitted that consortia have resulted in reduced sailing schedules and fewer direct connections between ports, referring to reduction in direct connections between ports in European countries and the Far East since mid-2019.<sup>77</sup>
- 8.31 The CMA notes the decreases in the UK's connectivity when measured by the LSCI in recent years, but that the UK's LSCI has still experienced an overall increase since 2011.<sup>78</sup> On the other hand, the CMA notes that at a global level, there is evidence that the number of direct connections between pairs of countries has declined in recent years.<sup>79</sup>
- 8.32 There are a number of factors which may contribute to changes in connectivity.<sup>80</sup> The CMA is not in the position to assess the specific contribution of consortia, amongst all the other factors, in the development of these overall trends. At a more general level, the CMA notes that there is a distinction between an individual liner being able to offer greater frequency and network coverage, and there being increased frequency and coverage *across* liners.<sup>81</sup> It is clearer that operating in consortia will result in the former. The effect of consortia on frequency and coverage across liners is more ambiguous. For example, while liners have argued that the impact of consortia is positive, other stakeholders have referred to consortia enabling the use of larger vessels, which then result in a lower frequency of services across liners.<sup>82</sup> UNCTAD has assessed that between 2006 and 2021 the number of shipping services declined on a global basis '*partly due to consolidation of liner shipping companies and the trend towards larger container ships*'.<sup>83</sup>

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<sup>77</sup> Response from BIFA. Permitted co-ordination being used to selectively remove scheduled sailings is also referred to by the Global Shippers Forum in "Reasons and Ways to Reform the EU Consortia Block Exemption Regulation (CBER) A Briefing for Policymakers by GSF, CLECAT and FIATA.", p1.

<sup>78</sup> [Maritime transport indicators – UNCTAD Handbook of Statistics 2022](#) The UK's LSCI increased from a score of 81 in Q1 2011 to a score of 91 in Q1 2021. It then declined to a score of 89 in Q3 2022.

<sup>79</sup> Container Shipping Industry: 2020 – 2021 supply and demand review prepared for the European Commission by MDS Transmodal. See figure 9.

<sup>80</sup> For instance, the CMA notes that recent falls in the number of active container ports in the global liner shipping network have been attributed by some to pandemic restrictions and the war in Ukraine. See UNCTAD (2023) [Review of Maritime Transport 2023](#), p89.

<sup>81</sup> If customers prefer not to switch between liners, then the ability for a given liner to offer greater frequency and coverage through a consortia is a more significant benefit. If, on the other hand, customers are indifferent between the liner with whom they contract for a particular shipment (eg because switching costs are low, and the service is homogenous), then customers are more likely to benefit when the frequency of services and coverage is increased across the network as a whole.

<sup>82</sup> Hutchison Ports referred in its response to the CMA's consultation to '[t]he trend towards increasing numbers of ever larger vessels, which has been facilitated to some extent by the CBER [...] As ships have increased in size so has the scale of port equipment and the level of port resource required to work the largest vessels. However, **the total number of ship calls has decreased**' (emphasis added).

<sup>83</sup> UNCTAD (2022) [Review of Maritime Transport 2022](#), p100.

## ***Environmental benefits***

- 8.33 Liners have said that larger vessels, and vessels operating nearer to their capacity, burn less fuel per container resulting in lower greenhouse gas emissions per container.<sup>84</sup> Therefore, by enabling larger vessels to be used and greater utilisation of capacity, consortia help to reduce the environmental impact of liner shipping per unit of cargo transported.
- 8.34 The CMA recognises in principle that larger vessels, more efficiently utilised, will - other things being equal - tend to produce lower emissions per container carried between two ports, than smaller vessels used less efficiently.<sup>85</sup>
- 8.35 It is possible that other factors may have a bearing on the overall effect of larger vessels operating in a wider supply chain. For example, the European Commission has noted the possibility that the use of larger vessels may result in cargo being unloaded at 'hub' ports, more remote from its final destination and requiring more carbon intensive modes of onward transport to complete the journey.<sup>86</sup> However, the CMA also acknowledges the submissions from liners arguing against this proposition, including on the basis that cargoes are not observed to have been consolidated at larger ports over the last 15 years.
- 8.36 Separate to the environmental impact of using larger vessels, the CMA has also considered the specific impact of operating in consortia (or the potential to operate in consortia) on the size of vessels ordered and utilised. The WSC provided the mean size of vessels operating on European trade routes according to whether they were operated (i) as a standalone service; (ii) within one of the three major alliances or (iii) within a consortia other than the three major alliances. This data confirms that vessels operated as part of alliances were significantly larger on average than vessels operated on a single-liner service. Vessels operated as part of consortia outside the major alliances were closer in size to vessels operated on a single liner service.<sup>87</sup>
- 8.37 The clear correlation between the average size of vessels and whether they are operated within alliances does not demonstrate that – absent consortia – the liners in question would have tended to order smaller vessels. The European Commission has said that *'there is no clear evidence that the orders for larger vessels have been linked to the planned or actual*

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<sup>84</sup> Response from WSC, ICS, ASA, pp44 - 46, response from THE Alliance, p.5, response to the consultation submitted on 22 February 2023 on behalf of the UK Chamber of Shipping, p.2.

<sup>85</sup> See, for example, International Maritime Organisation (IMO) (2020) *Fourth IMO Greenhouse Gas Study*, p181, table 60.

<sup>86</sup> EC 2023 SWD, p50.

<sup>87</sup> For instance, on the North Europe / Far East trade route, the averages were 18,833 TEU (alliances), 2,807 TEU (non-alliance consortia) and 5,089 TEU (single-liner service).



*membership in consortia*', and has said that there are indications that liners may make decisions to invest individually in larger vessels.<sup>88</sup> The CMA notes, for instance, that the cost-efficiencies of larger vessels may have made an independent contribution to liners choosing to operate larger vessels, regardless of whether they were able to operate within consortia or on a standalone basis.

### **Service quality**

- 8.38 Consumers of liner shipping services value the speed and reliability of services. Certain responses to the CMA's consultation questioned the benefits of consortia, on the basis that they considered service quality had declined during the pandemic. Logistics UK referred to its members describing a lack of differentiation in service, and withdrawal or revision of services at short notice.<sup>89</sup> The British International Freight Association said that its members considered that consortia did not improve the quality of services, particularly in terms of schedule reliability of customer service.<sup>90</sup> The Global Shippers Forum referred to co-ordination between liners being used to selectively remove scheduled sailings to maintain profitability.<sup>91</sup>
- 8.39 Certain indicators showed declining service quality during the pandemic. Schedule reliability, as measured by Sea-Intelligence, fell to 35.8% in 2021, from 78% in 2019.<sup>92</sup> Schedule reliability has improved over the past year, standing at 64.2% in July 2023, 23.8 percentage points higher than the same month in 2022.<sup>93</sup> This is, however, still below pre-pandemic averages.
- 8.40 Similar to the observed changes in prices, stakeholders representing liners proposed that *'reduced reliability during the pandemic [was]...the product of market forces and not attributable to carriers or consortia. Rather, it was the result of surge in goods transport demand particularly from the US, labour shortages and port and hinterland congestion which removed effective capacity from the market.'*<sup>94</sup>
- 8.41 The CMA acknowledges that factors other than the use of consortia may have contributed to the significant deterioration of service quality in the pandemic.

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<sup>88</sup> EC 2023 SWD, p41.

<sup>89</sup> Response to the consultation submitted on 23 February 2023 on behalf of Logistics UK.

<sup>90</sup> Response from BIFA.

<sup>91</sup> Response from Global Shippers Forum.

<sup>92</sup> [Sea-Intelligence - Global Liner Performance report – 2021-FY](#).

<sup>93</sup> Schedule reliability figures from [Sea-Intelligence](#).

<sup>94</sup> Response from WSC, ICS, ASA, p2.

On the extent to which consortia exacerbated or mitigated these developments, the CMA has received conflicting evidence.

### **Wider market developments**

- 8.42 As explained above, in addition to considering the impact of consortia on specific market outcomes, the CMA has also taken into account wider market developments in its assessment.
- 8.43 **Concentration:** Concentration in the global liner shipping industry has been relatively stable in the recent years including during the pandemic. However, over a broader time period, concentration has increased significantly. The 20 largest liners currently hold a 91.1% share of global capacity (up from 48% in 1996). The average number of liners serving any particular country has fallen from 18 to 13 from 2006 to 2022. As concentration has increased, there is an increased likelihood that separate horizontal cooperation agreements may involve participants that are common to multiple agreements.
- 8.44 **Vertical integration:** There is a trend towards liners participating in markets related to the deep-sea leg of the maritime transport market.<sup>95</sup> These include markets for ports, and for logistics services. In 2022, it was reported that the four largest liners are among the top ten terminal operators, and that alongside ports and terminals, liners were acquiring warehouses, freight-forwarding and other logistics businesses.<sup>96</sup>
- 8.45 Both market developments are potentially relevant to the competitive assessment of horizontal cooperation via consortia. For example, in the case of increased concentration, the Retained CBER itself recognises that negative effects may derive from the existence of links between consortia through common membership.<sup>97</sup> The potential for such links to arise is inherently increased in a market which is increasingly concentrated. In the case of vertical integration, the CMA recognises the impact is less clear. However, in general, there is a potential that changes in vertical integration could alter liners' incentives which may result in a greater risk of foreclosure and coordinated effects.

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<sup>95</sup> ITF (2022) "Performance of Maritime Logistics", International Transport Forum Policy Papers, No. 106, OECD Publishing, Paris.

<sup>96</sup> UNCTAD (2022) *Review of Maritime Transport 2022*, p138.

<sup>97</sup> Recital 12 of the Retained CBER concerns the grounds on which the benefit of the block exemption may be withdrawn from a particular agreement on the basis that the agreement has negative effects. It explains that in this context: '*the negative effects that may derive from the existence of links between the consortium and/or its members and other consortia and/or liner carriers on the same relevant market are of particular importance*'.

8.46 These broader market developments serve as an additional reason why the CMA considers it is more appropriate to consider the impact of consortia on a case-by-case basis in their actual market context, as the assessment is sensitive to the individual circumstances of the particular consortia, rather than providing for an automatic exemption.

## Conclusions

8.47 The CMA recognises that, in principle, consortia can enable liners to achieve certain economies of scale, resulting in efficiencies. However, based on the evidence received by the CMA (as summarised above), the CMA no longer has sufficient certainty that consortia covered by the Retained CBER will produce efficiencies which outweigh their potential impact on competition.

8.48 As set out above, the Section 9 exemption applies where four cumulative conditions are met. The CMA has focussed on two of these conditions: whether consortia produce efficiencies and whether consumers are allowed a fair share of the resulting benefits. As the CMA lacks sufficient certainty that these two conditions are met, it has not gone on to consider the degree of certainty as to whether the other two conditions for exemption are met, namely, that consortia do not impose restrictions which are not indispensable to the attainment of the efficiencies, and that consortia do not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

8.49 It should be emphasised that the CMA lacks sufficient certainty that the criteria required to justify an *automatic* exemption from the Chapter I prohibition are met. This does *not* imply that consortia will – if assessed individually – be unlikely to satisfy the conditions for exemption under section 9 CA98.

## 9. The advantages of a block exemption compared to self-assessment under the Chapter I prohibition

- 9.1 The previous section concerned whether the CMA has sufficient certainty that consortia will produce efficiencies such that they should be exempt. Separate to its assessment of the specific benefits produced by consortia, the CMA has also considered the wider advantages of maintaining a block exemption.
- 9.2 The potential advantages of a block exemption for consortia will result from:
- (a) the overall benefits produced by any consortia which – absent a block exemption – liners would not have entered into; and
  - (b) for those consortia which liners would still have entered into absent a block exemption, any reductions in liners' competition law compliance costs that would have been facilitated by a block exemption.
- 9.3 Therefore, the CMA has considered whether letting the Retained CBER lapse would result in either:
- (a) liners terminating the consortia agreements to which they are currently party, or deciding not to enter into future consortia agreements; or
  - (b) significant additional costs for liners to carry out self-assessments of their consortia agreements.
- 9.4 The CMA has had regard to the following factors, as set out in further detail below:
- (a) The fact that many liners that operate as part of consortia already have to self-assess – paragraphs 9.5 to 9.14.
  - (b) The impact of the Retained CBER in the UK, in the context of liners needing to carry out self-assessment of consortia agreements under EU competition law – paragraphs 9.15 to 9.19.

### Relevant factors

#### *Self-assessment is already routine*

- 9.5 For the Retained CBER to apply, the cumulative market share of the liners participating in the consortia must not exceed 30%. The CMA has received evidence that for a large proportion of consortia, this market share threshold is exceeded such that they do not benefit from exemption under the Retained CBER. Liners participating in consortia which exceed the market share

threshold would be subject to the ordinary provisions of competition law (including any other relevant block exemptions, and assisted by relevant guidance). They would be required to carry out self-assessment of the application of the Chapter I prohibition to their particular consortia agreements to determine whether those agreements met the conditions for individual exemption under section 9 CA98.

- 9.6 As explained in section 5, a consortia agreement can concern a single trade. Alternatively, the agreements can cover cooperation on multiple trades ('multi-trade consortia'). The European Commission has estimated that in 2020, there were approximately 43 consortia serving EU ports in 2020 (where a multi-trade consortium - such as an alliance - is counted as a single consortium).
- 9.7 A multi-trade consortium can benefit from exemption under the Retained CBER where the combined market share of the liners participating in the consortium does not exceed 30% in the markets in which the consortium operates (subject to the other conditions for exemption being met).
- 9.8 Stakeholders representing liners have argued against this approach. Their position is that if the combined market share of members of a multi-trade consortium does not exceed 30% in an *individual* market then it may benefit from exemption in that *particular* market, even if their market share exceeds 30% in other markets in which the consortium operates.
- 9.9 A number of arguments have been advanced in support of this position, including that the market share threshold refers to the market share in 'the relevant market' and does not envisage application of the threshold depending on the consortium's position across multiple markets.<sup>98</sup>
- 9.10 However, requiring the market share threshold to be satisfied in respect of each market in which a consortium operates reflects how a consortium is defined in the Retained CBER.<sup>99</sup> It is also consistent with the description of the exemption provided by the Retained CBER, which covers matters which in a multi-trade consortia would relate to each of the markets in which the consortium operates, such as the use of a joint operations office or potentially the pooling of vessels. The CMA therefore considers the correct interpretation

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<sup>98</sup> Other arguments include that the availability of the exemption on a 'per market' basis is consistent with the policy rationale of the market share threshold, which is that the exemption should be available where there is sufficient competition from liners outside of the consortium. Liners have also noted that unless the exemption is available on a 'per market' basis, liners may be disincentivised to enter markets where they will have a higher market share, so as to protect the availability of the exemption on other markets.

<sup>99</sup> See Article 2(1): "*consortium* means an agreement **or a set of interrelated agreements** between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to **one or more trades**" (emphasis added).

is that the threshold needs to be satisfied in each relevant market in which the consortium operates in order to benefit from automatic exemption. In addition, in considering the case for a UK block exemption, the CMA has taken into account that it would recommend that the criteria for the exemption in a UK CBEO would be consistent with the CMA's interpretation of how the market share threshold in the Retained CBER applies.

- 9.11 The CMA's approach in respect of the market share threshold is consistent with the approach taken by the European Commission. Applying this approach, the European Commission has estimated that of the 43 consortia serving EU ports, 13 had a market share which was below the 30% threshold for the application of the CBER. The European Commission has also analysed the applicability of the CBER to consortia operating on particular trades. Focussing specifically on trades to and from North Europe (which are the most relevant to the CMA's assessment), the European Commission identified that 35 consortia operated on each trade.<sup>100</sup> The European Commission identified only 12 consortia operating on trade routes to North Europe which satisfied the market share threshold in the CBER.
- 9.12 The WSC submitted its own assessment to the CMA of the number of consortia on trade routes to or from Europe which met the market share threshold in the CBER. The WSC's assessment was based on its interpretation of the CBER set out at paragraph 9.8. The WSC identified 59 consortia operating on European trade routes. Using the capacity share of the ships deployed as a proxy for volumes carried, the WSC estimated that (i) 27 (46%) had a combined capacity share which appeared to satisfy the market share threshold (ii) 29 (49%) had a capacity share above the 30% threshold and (iii) for 3 consortia (5%) it was uncertain, as the different methodologies used for calculating the capacity share produced different results, either side of the 30% threshold.
- 9.13 Therefore, even on the interpretation of the Retained CBER advanced by the liners, it is clear that a large number of consortia already operate above the market share threshold established in the Retained CBER, and therefore require self-assessment. For those consortia, they will need to self-assess in any event and therefore the advantages of a block exemption in terms of providing greater legal certainty are materially reduced, and it appears that lapse of the Retained CBER would be unlikely to result in liners ceasing

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<sup>100</sup> This figure is therefore greater than the number of consortia operating to North Europe, as it will count the operation of a multi-trade consortia multiple times for each trade to North Europe on which it operates.

participation to a significant extent in these consortia (on the basis that the participating liners are already carrying out self-assessments).

- 9.14 Further, the consortia which currently *do* benefit from exemption under the Retained CBER are necessarily those in which the participants have lower cumulative shares of the markets in which they operate. It is reasonable to expect that self-assessment of these consortia - in a scenario where the Retained CBER had lapsed - would be more straightforward than for the consortia whose participants have higher cumulative market shares, and for which self-assessment is already being carried out (whilst recognising that market shares would be one part of a wider analysis).

### ***The interaction between UK CBEO and the treatment of consortia under EU competition law***

- 9.15 As explained at paragraph 4.3 above, liner shipping services generally serve a 'string' of ports, rather than connecting only two ports.
- 9.16 The CMA understands that for all consortia currently serving UK ports, the consortia will also call at ports within the EU as part of the same service. Therefore, it appears that all consortia which call at UK ports are also likely to fall within the jurisdiction of EU competition law, by virtue of their calls at EU ports.
- 9.17 In these circumstances, the practical impact of a UK block exemption cannot be assessed in isolation from the position in the EU. Three scenarios can be distinguished:
- (a) If the Retained CBER lapsed, but the EU CBER were continued, liners operating services calling at both UK and EU ports would need to carry out self-assessments under UK competition law, but would benefit from automatic exemption under EU competition law.
  - (b) If the Retained CBER lapsed and the EU CBER also lapsed, liners operating services calling at both UK ports and EU ports would need to carry out self-assessments under both EU and UK competition law.
  - (c) If the Retained CBER continued as a UK CBEO, and the EU CBER lapsed, liners operating services calling at both UK ports and EU ports would benefit from automatic exemption under UK competition law, but would need to carry out self-assessments under EU competition law.
- 9.18 Stakeholders' feedback concentrated on the impact of scenario (a) above. Stakeholders representing liners said that liners would be likely to adjust the routes on which consortia operate so that they would bypass UK ports to

avoid an increased relative cost of compliance. For containers destined for the UK, the deep-sea leg of the journey would therefore be completed at an EU port. The containers would then be transhipped to the UK, adding cost and time to the overall journey.

- 9.19 It is now clear that the EU CBER will lapse in April 2024. The CMA has therefore considered what benefit a UK CBEO would provide (compared to a regime of self-assessment under UK competition law) specifically in the context of EU competition law requiring self-assessment under Article 101 TFEU:
- (a) First, the CMA has considered whether this scenario would result in liners re-routing their services to avoid calling at EU ports. The CMA concludes that this is unlikely.
  - (b) Second, based on liners continuing to operate routes calling at both EU and UK ports, the CMA has considered whether a UK CBEO would materially reduce any burdens associated with competition law compliance. The CMA concludes that this is unlikely.

### ***Changes in routes***

- 9.20 As explained above, there are currently no consortia which call at UK ports, but do not call at EU ports. Therefore, for all consortia currently in operation, they must comply with both UK and EU competition law. The CMA has considered the likelihood that these routes would change, in response to the EU CBER lapsing, but the Retained CBER being continued as a UK CBEO.
- 9.21 Stakeholders provided the following feedback on this question:
- (a) Some said that liners would continue to serve EU ports as part of any deep-sea routes which served UK ports. The reasons varied between stakeholders but included that competition law compliance costs were insufficiently large in the context of liner shipping to determine the countries at which liners called, and that the larger size of the EU market compared to the UK market would mean that UK services would continue to also call at EU ports.
  - (b) The WSC and the UK Chamber of Shipping said that the presence of a UK CBEO might encourage consortia to serve UK ports in preference to EU ports (in this scenario, containers destined for the EU would then need to be transhipped from the UK). The WSC noted that there are many variables at play (for example, the level of spare capacity at UK ports) that could impact the likelihood of such an outcome.



- 9.22 The CMA considers that it is unlikely that the presence of a UK CBEO in the absence of an EU CBER would result in routes being redesigned so that they called exclusively at UK ports:
- (a) The EU market is relatively larger than the UK market, such that a much higher proportion of cargo's final destination will be in the EU. It is unlikely that the costs saved by operating the deep-sea leg only to UK ports would offset the increased costs of having to tranship such a large proportion of the overall cargo on to EU ports by a short-sea route.
  - (b) Aside from liners' costs, it is not clear that the UK's port infrastructure could support the very large increase in volume which would be associated with UK ports acting as the intermediate destination for EU-destined cargo.
- 9.23 For these reasons, the CMA considers it is more likely that if the Retained CBER continued in the UK as a UK CBEO, services to UK ports would continue to form part of an overall route which incorporates EU ports.

***Value of a UK block exemption for liners already self-assessing under EU competition law***

- 9.24 It follows that for liners operating consortia on routes to UK ports, although they may benefit from an automatic exemption from the UK's Chapter I prohibition under a UK CBEO, it is likely they would need to carry out self-assessment against Article 101 TFEU.
- 9.25 In these circumstances, the CMA considers the benefits of a UK CBEO would be substantially reduced. Once a liner had carried out a self-assessment under EU competition law, the ability to benefit from automatic exemption under UK competition would be of significantly less value. In particular:
- (a) Article 101 TFEU and the Chapter I prohibition of the CA98 set broadly similar requirements on the circumstances in which a consortia is considered to restrict competition, and if so, the conditions which would need to be met for consortia to benefit from exemption under either Article 101(3) of the TFEU or section 9 of the CA98.
  - (b) For deep-sea routes to ports within Northern Europe, liners are likely to treat liner shipping from a given geographic area to ports in Northern Europe as the relevant market for the purpose of the competition assessment. For example, the market for liner shipping services from North America to Northern Europe, or the Far East to Northern Europe. It follows that the subject of the assessment under UK and EU competition law is likely to be broadly similar.

- (c) Once a liner has completed a self-assessment under EU competition law (as they would need to do in the absence of an EU CBER) carrying out a self-assessment under UK competition is therefore unlikely to involve any significant additional compliance burden. It follows that the presence of a UK CBEO is unlikely to substantially reduce compliance burdens where self-assessment is required under EU competition law.

## **Conclusions**

- 9.26 For the reasons given in this section, the CMA considers that creating a new UK CBEO as a sector-specific block exemption would give rise to insufficient benefits compared to a scenario where the consortia agreements that might be exempt under a UK CBEO are assessed according to the ordinary provisions of competition law.

## 10. The CMA's provisional decision

- 10.1 **For the reasons set out above, it is the CMA's provisional decision that it will not recommend to the Secretary of State for Business and Trade that the Retained CBER be replaced by a new UK CBER.**
- 10.2 In the event that the Retained CBER lapsed, liners participating in the proportion of consortia agreements currently benefiting from exemption would need to consider the application of an alternative block exemption (such as the specialisation block exemption<sup>101</sup>), or, if not, they would need to self-assess compliance of the agreement with the Chapter I prohibition. In carrying out any self-assessment, liners would be assisted by relevant guidance published by the CMA, including its *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements* and its *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements*.<sup>102</sup>
- 10.3 As explained further at paragraph 1.8 above, the CMA invites comments on its provisional decision by Friday 15 December 2023.

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<sup>101</sup> Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022.

<sup>102</sup> These guidance documents can be accessed at the following links: [Guidance on horizontal agreements](#) and [Guidance on environmental sustainability agreements](#).

## ***Annex A: Processing of personal data and Government consultation principles***

- 10.4 In preparing this consultation document, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.
- 10.5 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 10.6 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the proposed recommendation to the Secretary of State before it is finalised.
- 10.7 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 10.8 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need to exclude from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential. When submitting your response please also let us know if you wish to remain anonymous.
- 10.9 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, if you have made any representations about the confidentiality of any information contained in your response, we will take such representations into consideration. We will also be mindful of our responsibilities under the data

protection legislation referred to above and under Part 9 of the Enterprise Act 2002.

10.10 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.