



The Global Voice of Cargo Owners

Unit A, Farriers Courtyard,
Spelmonden Road, Goudhurst, Cranbrook TN17 1HE, UK
T: +44 15 80 75 45 23
M: +44 78 18 45 04 40
secretariat@globalshippersforum.com
globalshippersforum.com

15 December 2023

Competition and Markets Authority
The Cabot
25 Cabot Square
London E14 4QZ

Dear Sir/Madam

GSF Response to CMA Provisional Decision Not to Recommend that the Retained CBER be Replaced with a UK CBEO

I am responding on behalf of the Global Shippers Forum (GSF) to CMA's Provisional Decision on the Retained CBER, issued on 17 November 2023.

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

Welcome and encouragement of the provisional decision in view of evidence

GSF supports and welcomes CMA's provisional decision not to recommend the introduction of a UK block exemption for liner shipping and that the CBER therefore be allowed to expire on 25 April 2024.

GSF notes that CMA has reached a similar conclusion to the European Commission as regards its own block exemption regulation, that it is no longer fit for purpose. However, CMA has done so by a different process and, in some cases, for different reasons. Crude characterisation of CMA's provisional decision by some commentators as simply mimicking the EU response is therefore poorly informed.

GSF applauds CMA's willingness to reconsider its original position, as set out in its consultation document dated 19 January 2023, in the light of new facts and reasoning presented to it during the consultation process. GSF encourages CMA in its thinking and conclusions and believes that threats of possible undesirable consequences for container shipping services serving UK ports are highly unlikely to materialise.

Support for CMA's reasoning and principal conclusions

GSF notes and welcomes the following points made in CMA's Provisional Decision:

- that CMA has provisionally decided not to recommend the replacement of the CBER retained in UK law after Brexit, with a UK block exemption.
- that CMA no longer has sufficient certainty that the benefits of consortia operation outweigh its restrictive effects on carrier competition.
- that CMA concludes that the absence of a UK CBEO is unlikely to result in changes in consortia services calling at UK ports, despite the European Commission's decision to end its Block Exemption.
- that CMA further concludes that consortia services will continue to serve EU and UK ports but that were a UK CBEO to be available it is unlikely to result in lower compliance costs for carriers, given their need to self-assess under EU competition law in future.

Support from the European Commission's evaluation findings

Although conducted in the specific context of the impact and value to the European Union, GSF notes that several of the European Commission's findings will be equally valid and applicable in other jurisdictions, including the UK. GSF notes the following findings made by the Commission will also be applicable in a UK context.

- The analysis and findings of the MDS Transmodal report on global liner shipping supply & demand during 2020-21.
- The methodological limitations of linking consortia to consumer benefits.
- The Commission's "two words of caution" over carriers' substantiation of the actual consumer benefits attributable to block-exempted consortia.
- Carriers' incomplete or inconsistent understanding of the Block Exemption rules.
- The insignificance of compliance costs compared to carriers' operating costs.
- The subordinate role of anti-trust exemptions in deciding whether a carrier joins a consortium.
- The rejection of the indispensability of consortia to achieving environmental goals.

A decisive finding by the European Commission is that shipping lines seem to be uncertain what types of cooperation agreements are covered by the CBER and which are not. The Commission therefore finds that it would not be possible for lines to distinguish between activities that constituted permitted capacity 'adjustments' and actions that would constitute limitation of capacity, which is expressly prohibited.

A further crucial point made in the Commission's Staff Working Document is that the Consortia Block Exemption is not part of established EU transport or competition policy, and therefore in evaluating whether to continue with it, the Commission needs to be convinced that the merits of the Block Exemption outweigh the norms and principles of established EU policies and instruments. Similar considerations apply in the UK. There is no presumption in favour of consortia operation in UK transport policy and as other means exist of facilitating the necessary co-operations between shipping lines (e.g. horizontal guidance), justification for an automatic exceptional and specific block exemption is not a given.

GSF also notes that many of the points in the Commission's findings regarding methodology, carriers' comprehension, and the significance of compliance costs, if true in 2023, would have also been true at the time of each previous evaluation of the Block Exemption in 2020 and 2015.

Advantages of a UK CBEO, given the EU decision to allow the CBER to lapse

GSF recognises the significance of CMA's additional analysis of the possible value of a Block Exemption for liner consortia to the UK, given the EU's decision to allow its CBER to lapse.

The likelihood of shipping lines ceasing to serve the UK, or the EU, due to changes in competition law are remote, for the following reasons:

1. Many shipping lines through their corporate group structures, own and operate the port terminals, that would stand abandoned or severely under-utilised were this threat to be implemented.
2. Competitive pressures would normally mean that services and port slots vacated by one shipping line would be vulnerable to being acquired by another.
3. The suggestion that shipping lines would collectively decide to 'boycott' the UK (or the EU) implies a level of coordination and cooperation on limitation of capacity that far exceeds that envisaged by the Retained CBER, or indeed permitted under the Competition Act 1998.

Conversely, the notion that by implementing a CBEO the UK could provide the desired level of legal certainty for shipping lines participating in consortia and so make UK ports a preferred destination for consortia services, is also unlikely to be realised in practice. Given most containers carried by such services would ultimately be destined for the EU, they would require transshipment to smaller 'feeder' vessels in the UK for delivery to EU ports. The costs of this would be recovered as a permanent new overhead on EU containerised imports, which, it is reasonable to assume, would far exceed the additional burden of periodic self-assessment of consortia under competition rules.

GSF also notes comments by representatives of the UK ports industry (recorded in the CMA Provisional Decision) that their members simply do have the capacity to handle this level of transshipment traffic.

Practical effects of self-assessment

The risk that liner shipping consortia will inevitably end because of the loss of the Block Exemption continues to be articulated but this is considered unlikely to happen in practice. The cost efficiencies to shipping lines of co-ordinating sailings and vessels through consortia agreements are sufficiently large to outweigh the additional costs of professional legal assessment of the compliance of such arrangements. This may be inferred from the large number of consortia and alliances that exceed the 30% market share threshold for the CBER to apply but which continue operating under current Horizontal guidance, by (presumably) conducting periodic self-assessments.

GSF believes that the cooperations and coordination necessary to operationalise a vessel sharing agreement are standard and common to all consortia. Once instituted and assessed there should be little, if any, variance in the frequency of exchanges, the types and nature of information exchanged, and the functions of each consortia member involved. It would therefore seem that after an initial self-assessment to establish the legality of the intended exchanges, there would be little need for extensive subsequent re-assessment, unless one of the variables significantly changed. The notion that self-assessment under Section 1 of the Competition Act creates an on-going cost burden likely to make consortia operation uneconomic does not stand up to scrutiny.

Indeed, the pool of legal advice and case law available to shipping lines needing to make and inform self-assessments under horizontal guidelines is significantly wider and deeper than in the specialised niche of maritime block exemptions. There is also a reasoned argument that many of the practices established under the CBER serve as precedent for compliant practices under Horizontal Guidance, at least in the early years following ending of the CBER.

The threat of precipitate action by shipping lines following the ending of the CBER is predicated on alleged high costs of self-assessment and lingering risk of compliance with Section 9 conditions. These costs, however, will be periodic, finite, and likely to reduce over time. In case of doubt CMA should ask the container shipping industry to demonstrate how and why such occasional costs would exceed the permanent additional overhead of radical restructuring of its operations, in the ways threatened.

GSF also commends CMA's observation that the way shipping lines are diversifying their activities into other parts of the logistics market, and can be expected to continue doing so, means that they are becoming distinctive entities and therefore no longer capable of being treated as a 'Block' for competition purposes. GSF strongly supports CMA's conclusion that the best and most effective way for the cooperations undertaken by these different entities is by self-assessment which will allow the distinctive activities of each entity to be taken account of in any review.

GSF trusts these comments are helpful to CMA in finalising its decision and remains available to respond to any further questions or requests for information.

Yours faithfully

[✂]

James Hookham
Director