COMPETITION & MARKETS AUTHORITY

LINER SHIPPING CONSORTIA BLOCK EXEMPTION REGULATION

PROVISIONAL DECISION

RESPONSE TO CONSULTATION

15 December 2023

BY

UK CHAMBER of SHIPPING

World Shipping Council

International Chamber of Shipping
Shaping the Future of Shipping

ASA
Asian Shipowners' Association

The Associations

- The UK Chamber of Shipping is the trade association for the UK shipping industry, with members ranging from shipowners, managers, ship operators, law firms with maritime expertise, insurers, classification societies, to others providing maritime services to the shipping industry.[1] These members span across a broad and diverse range of sectors which provide passenger services, marine construction and engineering, dredging, towage and marine transportation services to many parts of the UK and the wider global economy.

- WSC is a trade association representing the global liner shipping industry.[2] Its members operate 90% of global liner shipping capacity and transport approximately 60% of the value of global seaborne trade.

- ICS is the global trade association for shipowners and operators, representing the world's national shipowner associations and over 80 % of the world merchant fleet.[3]

- The ASA consists of six ordinary members from the shipowners' associations of Asia Pacific nations: Australia, China, Hong Kong, Japan, Korea, and the Federation of ASEAN Shipowners' Associations ("**FASA**").[4] ASA's membership is estimated to control about 50% of the world merchant fleet.[5]

[1] For more information about UK Chamber, please visit: https://www.ukchamberofshipping.com/.

[2] For more information about WSC, please visit https://www.worldshipping.org/

[3] For more information about ICS, please visit https://www.ics-shipping.org/

[4] FASA represents shipowners of Brunei, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. For more information about FASA, please visit https://www.fasa.org.sg/

[5] For more information about ASA, please visit https://asianshipowners.org/index.php

CMA UK CBER Provisional Decision of 17 November 2023

Response of UK Chamber of Shipping, WSC, ICS and ASA

I. EXECUTIVE SUMMARY

1. This submission is made on behalf of the UK Chamber of Shipping ("**UK Chamber**"), the World Shipping Council ("**WSC**"), the International Chamber of Shipping ("**ICS**") and the Asian Shipowners' Association ("**ASA**") (collectively, the "**Associations**"), in response to the consultation on the CMA's provisional decision not to introduce a UK-specific block exemption for liner shipping consortia on expiry of the Retained Consortia Block Exemption Regulation ("**Retained CBER**").[6]

2. Consortia enable shipping lines to place cargo on each other's services, creating ocean freight networks that facilitate the continued inclusion of the UK in global supply chains. The CBER provides legal certainty for those arrangements. The Associations are concerned by the reversal of the CMA's original recommendation, which presented strong evidence in favour of replacing the Retained CBER with equivalent UK legislation. If the CMA's current decision not to replace the CBER is confirmed and followed by the Department for Business and Trade, this will harm the international maritime sector on which the UK's trade and economic competitiveness depend. Indeed, it would represent a missed opportunity to take advantage of the regulatory autonomy afforded by Brexit to adopt a legal framework suitably adapted to the UK's trading and growth agenda.

3. The success of the UK as a trading nation is heavily reliant on shipping for almost 95% of its imports and exports in goods.[7] The Government forecasts that global maritime volumes will treble by 2050.

4. Almost all manufactured goods are transported in containerised liner shipping organised through vessel-sharing arrangements – otherwise knows as 'consortia'. Consortia are a

[6] CMA Provisional Decision, *Liner Shipping Consortia Block Exemption* ("**CBER Provisional Decision**"), 17 November 2023
[7] Value of Shipping report (https://www.ukchamberofshipping.com/news/chamber-launches-value-shipping-report) indicates that 95% of goods arrive in the UK via ship.

win-win, transport efficiency tool for shipping companies, manufacturers and consumers. They allow liner shipping companies to rationally share space on each others' ships and to operate joint services, generating operational, cost and climate efficiencies. Consortia achieve economies of scale by enabling liner shipping companies to offer more extensive, more frequent and more regular services than they could on their own. Customers and consumers directly benefit from this improved frequency and coverage. By participating in consortia, small and medium-sized shipping companies obtain easier market access, hence increasing competition. By consolidating the cargoes of the consortia members, consortia, deploy more efficiently sized ships, increase vessel utilisation and dramatically reduce unit costs, fuel consumption and harmful emissions per cargo unit. The use of consortia also aligns with the UK's Net Zero Strategy as well as significantly contributing to UK investment, job creation, and trading opportunities.

5. In recognition of these benefits and the need to provide legal certainty, consortia have benefitted from an EU block exemption for the last 28 years – and in the UK under the Retained Consortia Block Exemption Regulation since Brexit. The CBER facilitates the creation and operation of efficient consortia by greatly reducing the compliance burdens and legal risks required to establish this type of beneficial cooperation. Most of the UK's major trading partners also have some form of antitrust immunity for such arrangements because the benefits of consortia are widely recognised. But having initially concluded that the UK should retain the block exemption, the CMA has now provisionally decided to follow the European Commission's position.

6. The CMA's analysis and rationale for following the Commission's lead is flawed for various reasons. It:

- Relies on the brief and exceptional period of the global pandemic to claim that the benefits of consortia have not been proven with sufficient certainty, disregarding evidence that the price spikes during that period cannot be attributed to consortia and that in the long run consortia have had a downward effect on prices.

- Introduces an unprecedented and unwarranted 'certainty' requirement for assessing the benefits of consortia. It fails to balance the proven benefits of consortia against the minimal restrictions of competition which are inherent in the achievement of these benefits.

- Lacks credible evidence for claiming a reduction of UK liner shipping connectivity. The Associations have provided ample evidence to the contrary.

- Relies on unsupported assertions by one UK port about increased costs associated with larger vessels, which again run counter to evidence submitted by the Associations.

- Fails to consider that the CMA may address any future concerns, by including a provision in a UK-specific CBER enabling the cancellation of the benefit of the block exemption on both a general and an individual basis.

7. It is imperative for the CMA and the UK Government to assess the UK's specific trade requirements and not rely on the Commission's evaluation. The UK Government should utilise its post Brexit regulatory freedoms to establish a regulatory framework which best supports the UK's specific trade and growth agenda. Doing so will contribute now more than ever to the growth and sustainability of a liner shipping sector at the service of UK trade and consumers.

8. The Associations therefore call on the CMA to maintain its original recommendation and replace the Retained CBER with a UK equivalent prior to expiry of the Retained CBER in April 2024.

II. A UK-SPECIFIC CBER REPRESENTS AN OPPORTUNITY FOR THE UK TO ACHIEVE ITS INTERNATIONAL TRADE AMBITIONS

A. <u>A successful maritime industry is of vital importance to the UK's post-Brexit economic growth</u>

9. Just a few months before the UK's exit from the European Union, the then Transport Secretary, Grant Schapps MP made a speech to celebrate London International Shipping

Week 2019.[8] As part of his *"vision for shipping and UK maritime"*, he sought to *"assure [the audience] that this is a government that fully recognises maritime's significance […] [b]ecause while it's vital that we celebrate UK maritime's extraordinary past, recall our 'island story' and rightly honour our proud seafaring tradition, we also have a responsibility to invest in its future"*.

10. Turning specifically to Brexit, he commented that *"we must seize this chance [and show] that Britain is ready to welcome the world"*. In this regard, the Government's objectives (as established in its Maritime 2050 strategy)[9] have recently been restated in the following terms: *"The UK's trade relies upon the maritime sector. Approximately 95 per cent of goods by weight come to the UK by ship. This is likely to continue, with the expectation that global maritime trade volumes will treble by 2050. The Government recognises its importance, saying that "simply put, without the maritime sector, the country would not work." It also notes that maritime trade is determined by many factors, meaning that "international trading relationships may change - resulting in increasing or decreasing globalisation.""*[10]

11. Moreover, the Government recognises that the *"maritime sector operates on a longer-term timescale to many other transport modes"* and, consequently, *"[p]lans are needed decades ahead"*.[11]

B. The Government is focused on 'smashing' even more barriers to trade

12. In a similar vein, the Secretary of State for Business and International Trade, Kemi Badenoch MP has expressed her pride that the Government has *"been able to unlock*

[8] Speech, *London International Shipping Week Gala Dinner,* Speech given by the Secretary of State for Transport, Grant Shapps, to celebrate London International Shipping Week 2019 ("**Grant Schapps Speech 2019**"), Published 23 September 2019, available at: https://www.gov.uk/government/speeches/london-international-shipping-week-gala-dinner.
[9] See further, Submission by WSC, ICS and ASA to the CMA, *Evaluation of the Retained Liner Shipping Consortia Block Exemption Regulation,* 24 November 2022 ("**November 2022 Submission**"), pp. 18-19.
[10] Maritime 2050: Government Response to the Committee's Fifth Report, para. 15 ("**Maritime 2050: Government Response**"), available at: https://committees.parliament.uk/publications/40458/documents/197439/default/.
[11] Maritime 2050: Government Response, para. 7.

billions for the UK economy, and [is looking] forward to smashing even more barriers to ensure [UK] businesses thrive."[12]

13. Indeed, this is Ms. Badenoch's "first priority" in her role:

> *"Domestically, this means not about taking away any safety nets. It's about ensuring that we have a modern, dynamic, nimble economy where the regulations are fit for purpose and actually help businesses to start up, grow and export.*
>
> *Internationally, we want to remove barriers to trade, in particular remove barriers to our exporters.*
>
> *Leaving the EU was not an end itself, now it is incumbent upon us to realise the opportunities that Brexit has enabled.*
>
> *One of the things that we can now do with our independent trading policy is make sure that the global trade rules work for the UK, not just the UK and 27 other countries."*[13]

14. Accordingly, a UK-specific CBER presents an opportunity to maintain and strengthen the UK's maritime and trade connectivity. It provides essential support for the UK to trade with the world through the framework of consortia. The legal certainty for vessel sharing provided to international shipping lines through the CBER, enable cost, operational and climate efficiencies for the UK's maritime commerce, that are passed on to businesses and consumers. These are fundamentals for stability and long-term economic growth in this *"sometimes-overlooked "Cinderella" sector […] vital to the UK economy"*.[14]

[12] Press release, *Business and Trade Secretary opens up markets worth £11 million every day to UK businesses, Published 26 March 2023*, available at: https://www.gov.uk/government/news/business-and-trade-secretary-opens-up-markets-worth-11-million-every-day-to-uk-businesses.

[13] *Speech, Business and International Trade Secretary gives speech on global prosperity, Published 28 February 2023* (emphasis added), available at: https://www.gov.uk/government/speeches/business-and-trade-secretary-gives-speech-on-global-prosperity.

[14] *Government should invest in maritime tech, cleaner fuels and workforce, Transport Committee says, 20 March 2023*, available at: https://committees.parliament.uk/work/6555/maritime-2050-objectives-implementation-and-effects/news/194252/government-should-invest-in-maritime-tech-cleaner-fuels-and-workforce-transport-committee-says/.

C. <u>The CMA's responsibility to support UK investment, innovation and growth</u>

15. The current review provides an opportunity for the Government to support UK growth and competitiveness though its maritime sector. The overall contribution of regulation to economic growth aligns squarely with the Government's objectives for regulators, a critical theme in its most recent Strategic Steer to the Competition & Markets Authority.[15] Specifically, the *"Government expects the CMA to:*

- *[…] <u>support investment, innovation and growth</u> by promoting competitive markets, taking steps to increase the <u>strength of competition across the UK economy</u>, and focussing on markets that have a significant, economy wide impact*;
- *[…] act as a thought leader at home and abroad, engaging on competition and consumer issues across the United Kingdom; and <u>using its post-Brexit role to shape the international debate</u> and response on key cross-border issues;"*

16. Additionally, the *"Government expects the CMA to <u>prioritise outcomes that promote competition, investment, innovation and boost economic growth […] secur[ing] post-Brexit opportunities</u> by ensuring its analysis, decisions and remedies are fully focused on <u>maintaining competitive and well-functioning markets in the UK</u> that benefit consumers and allow businesses to thrive, including advising government on opportunities to improve the UK's pro-competition environment outside of the EU"*.[16]

17. The CMA claims that it lacks a sufficient certainty to be able to conclude that the Retained CBER delivers benefits in pursuit of these goals. However, as described in the following paragraphs the Associations consider this is unfounded.

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[15] *Strategic steer to the Competition and Markets Authority 2023*, Policy Paper, 23 November 2023 ("**Strategic Steer 2023**"), available at: https://www.gov.uk/government/publications/strategic-steer-to-the-competition-and-markets-authority-2023/strategic-steer-to-the-competition-and-markets-authority-2023.

[16] Strategic Steer 2023 (emphasis added). These goals align with the CMA's own stated policy on UK economic growth: *"The whole UK economy can grow productively and sustainably. The CMA's work to promote competitive markets and tackle unfair behaviour should support productivity, innovation and growth across the whole of the UK economy. We will focus particularly on ensuring that competition supports a resilient economy that can grow sustainably. Our work should drive benefits across all 4 nations of the UK"* (Competition and Markets Authority Annual Plan 2023/2024, para. 4.4). This also reflects the CMA's statutory responsibility to *"seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers"* (Enterprise and Regulatory Reform Act 2013, section 25).

D. <u>The CMA has the tools and evidence available to it to advance the economic objectives of regulatory action</u>

1. The CMA has evidence available to it for the application of the applicable legal framework

18. Any assessment of the exemption criteria under Section 9 of the Competition Act 1998 ("**CA98**") involves a weighing of pro-competitive efficiencies against the anti-competitive effects of the agreement (or category of agreements) under consideration. This exercise cannot be applied in the abstract: the sufficiency of the pro-competitive benefits of the agreement under consideration can only be judged by reference to the nature and extent of its anti-competitive effects.

19. The Associations have demonstrated that, despite the fact that consortia agreements involve a certain degree of horizontal cooperation in the provision of a joint service (involving agreements on capacity, scheduling and ports of call), this cooperation is integral to the achievement of the pro-competitive efficiencies of consortia and does not negatively impact the key parameters of competition on price and customer relationships. Indeed, consortia actually increase competition between carriers. This is because, by lowering barriers to entry and increasing the number, range and frequency of services they can offer, consortia allow more carriers (whatever their size) to compete on more legs of trade than would be the case in the absence of consortia.[17]

20. These are all factors confirming the pro-competitive rationale of consortia: that they incorporate mechanisms that *"are in principle capable of improving the functioning"*[18] of the market and help *"make way for more effective competition"*.[19]

21. The Associations have also presented ample evidence on the benefits of consortia, together with an explanation of various industry characteristics and trends relevant to that assessment.[20] The following are examples of evidence on efficiencies available to the CMA, appraised in their proper context:

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[17] November 2022 Submission, paras. 42-46.
[18] Judgment of 23 November 2006, Case C-238/05, *Asnef-Equifax*, ECLI:EU:C:2006:734, para. 55.
[19] Judgment of 15 December 1994, Case C-250/92, *Gøttrup-Klim Grovvareforening and Others*, ECLI:EU:C:1994:413, para. 32.
[20] November 2022 Submission, Sections V and VI.

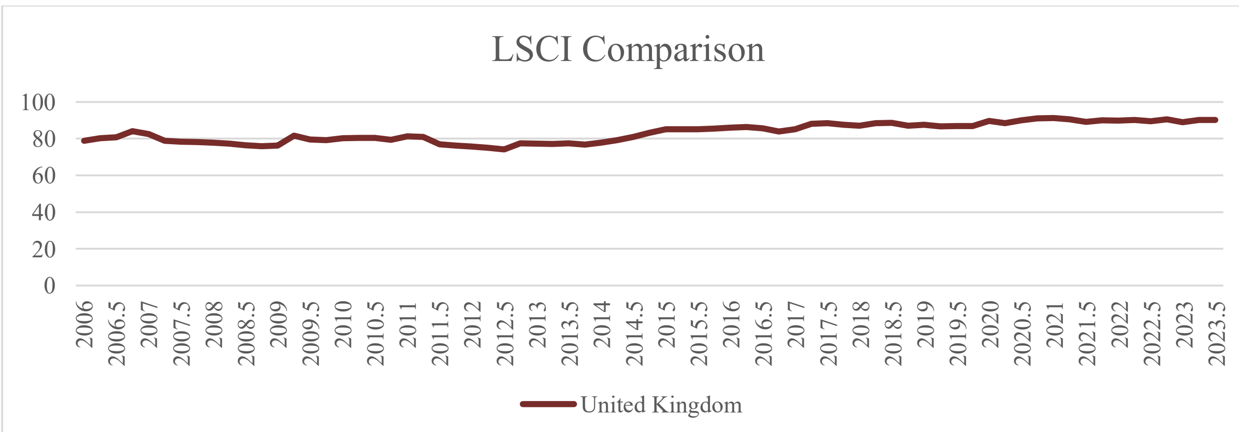
- **Price efficiencies**. The CMA concludes that "*the [CRA] analysis submitted by the WSC does not clearly demonstrate that consortia, in general, will have a downward effect on prices*".[21] But the CRA report was not drafted with that objective. It was intended to examine the specific question whether consortia had contributed to the price spikes during the pandemic (which is the only anomalous period of recent decades where prices trended upwards). The more general downward effect of consortia on prices is something that (i) has long been recognised (including by the EC in its prior reviews of the CBER)[22] and (ii) has been demonstrated again to the CMA in the context of this evaluation (see, *e.g.*, Part II of WSC's submission of 23 February 2023 which showed, over a 20 year period, the considerable freight rate discount compared to the global consumer price index).

- **Service quality (frequency/coverage).** The CMA finds that direct connections and the number of shipping services have declined on a global basis.[23] And yet it concedes,[24] consistent with the evidence submitted by the Associations, that such trends are not applicable to Europe or the UK. For instance, the Associations demonstrated, with reference to UNCTAD's Liner Shipping Connectivity Index ("**LSCI**"), that the integration of European countries in international shipping networks continued to improve over time[25] and – for the UK specifically – the LSCI index increased by 20% in the ten-year period from 2012-2022.[26] The Associations also demonstrated that, as of September 2022, 33 different carriers were operating 91 unique services calling at UK ports and that the industry was experiencing ongoing entry and expansion.

[21] CBER Provisional Decision, para. 8.28.
[22] See 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), Chart 7, p. 29, SWD (2019) 411 final.
[23] CBER Provisional Decision, paras. 8.31-8.32.
[24] See, *e.g.*, CBER Provisional Decision, para. 8.31 "*the UK's LCSI has still experienced an overall increase since 2011*".
[25] November 2022 Submission, RBB Report I, page 20 with reference to Figure 2 (on page 21), and Figures 11 and 12 in Annex C.
[26] November 2022 Submission, RBB Report II, page 9.

- In respect of the LSCI index for the UK,[27] the Associations note the CMA's reliance on the figure for Q3 2022 (89) in its remarks on *"decreases in the UK's connectivity [...] in recent years"*.[28] However, earlier in the CBER Provisional Decision, the CMA cites the availability of the most recent data at a port level (Q2 2023).[29] That figure for the UK overall, at 90.1, is in fact higher than Q3 2022, almost reaching the highest score during the period Q1 2006 to Q3 2022 of 91.24 (Q1 2021).[30]

Figure 1 - UK LCSI data for the period for which data is available (Q1 2006 - Q2 2023)[31]



22. Accordingly, the evidence available to the CMA continues to support its conclusion in the CBER Proposed Recommendation that the benefits brought about by consortia *"underpin the rationale for the retained CBER, which sets out that consortia agreements 'generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through the*

[27] UNCTAD describes the LSCI as indicating a country's integration level into global liner shipping networks. The current version of the LSCI is generated from the following six components: (a)The number of scheduled ship calls per week in the country; (b) Deployed annual capacity in Twenty-Foot-equivalent Units (TEU): total deployed capacity offered at the country; (c) The number of regular liner shipping services from and to the country; (d) The number of liner shipping companies that provide services from and to the country; (e) The size in TEU (Twenty-Foot-equivalent Units) of the largest ship deployed on services from and to the country; (f) The number of other countries that are connected to the country through direct liner shipping services (Note that a direct service is defined as a regular service between two countries; it may include other stops in between, but the transport of a container does not require transhipment).
[28] CBER Provisional Decision, para. 8.31.
[29] CBER Provisional Decision, para. 4.6.
[30] UNCTAD, Liner shipping connectivity index, quarterly, available at: https://unctadstat.unctad.org/datacentre/dataviewer/US.LSCI.
[31] UNCTAD, Liner shipping connectivity index, quarterly, available at: https://unctadstat.unctad.org/datacentre/dataviewer/US.LSCI.

economies of scale they allow in the operation of vessels and utilisation of port facilities'".[32]

2. The CMA is not required to apply a more stringent standard of assessment than is required under Chapter I CA98

23. In considering effects and efficiencies, the CMA unduly restricts its analysis by applying an impossibly high standard of "sufficient certainty" that consortia will produce efficiencies outweighing their potential impact on competition (the "**Sufficient Certainty Standard**").[33]

24. It acknowledges that this involves consideration of, first, the presence of potential effects on competition, and second, whether those potential effects are outweighed by possible efficiencies for consumers.[34] This resembles the balancing exercise described above at para. 18. Yet, despite its clear assertion that it is *"not possible"* to conduct a balancing exercise by reference to efficiencies *"without assessing the potential effects on competition"*,[35] the CMA has examined the "sufficiency" of the pro-competitive efficiencies in the abstract without any balancing against the limited effects on competition which consortia involve; and in concluding that such efficiencies are insufficiently certain it applies a higher standard to the application of the exemption criteria than is required under Chapter I CA98.

25. Indeed, the CMA merely asserts the potential effects on competition on the basis of speculative theories, without adducing any evidence or analysis. It then restricts its more detailed assessment to potential efficiencies, without conducting a balancing exercise of such efficiencies – the existence of which was recognised in the CMA's Proposed Recommendation – against the limited forms of cooperation which are integral to the provision of a joint service.[36]

[32] CBER Proposed Recommendation, para. 3.3, citing Recitals 5 and 6 CBER.s
[33] CBER Provisional Decision, paras. 7.4-7.5, and Chapter 8.
[34] CBER Provisional Decision, para. 8.3.
[35] CBER Provisional Decision, para. 8.3.
[36] CBER Provisional Decision, paras. 8.7, 8.9-8.10. These aspects were at least more closely considered in the CBER Proposed Recommendation, with no relevant concerns raised, e.g., on coordination, para. 3.10. Similarly, the CMA also refers to broader

26. For instance, the CMA states that *"[s]takeholders representing liners' customers [...] 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"*.[37] The CMA relies here on comments from BIFA[38] which itself relies on data from MDS Transmodal: *"The MDS Transmodal data shows that between Q1 2020 and Q2 2022, the number of direct connections between EU countries and Far-East countries decreased by around 8.5%, even reaching an 11.7% decrease in Q1 2022"*.[39] Additionally, the CMA purports to rely on a very general comment from Global Shippers Forum on *"co-ordination between liners being used to selectively remove scheduled sailings to maintain profitability"*.[40] This claim is unsupported by any evidence or any attempt to demonstrate that the liners were not simply making *"capacity adjustments in response to fluctuations in supply and demand"* as permitted by the Retained CBER (Article 3(2)).

27. It is difficult to claim that the reduced sailing schedules and direct connections over this period were the result of anything other than the COVID 19 pandemic and its disruptive impact on global supply chains. It is even less credible to claim a link to consortia or the Retained CBER. Both the Federal Maritime Commission (FMC) and the European Commission found no causal link between the negative supply chain conditions experienced during the pandemic and the actions of liner shipping companies or as a result of consortia.

28. Reduced sailings in early 2020 can be attributed to the fall in worldwide consumer and business demand and manufacturing output as the first COVID waves and accompanying lockdowns occurred. Vessel schedules were curtailed and sailings were blanked globally.

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market developments in support of its determination under the Sufficient Certainty Standard, <u>first</u>, on concentration and, <u>second</u>, on vertical integration. In relation to the former, it is unclear why the CMA has sought to 'shift the goalposts' by looking at industry concentration over a much broader time period, rather than merely examining the period since the last evaluation (CBER Provisional Decision, para. 8.43 uses 1996 and 2006 as benchmarks). As regards the latter, the CMA states that *"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"* (CBER Provisional Decision, para. 8.45). The CMA does not expand on this conclusion before deploying it as one of the "broader market developments" that justify the lapse of the CBER (CBER Provisional Decision, para. 8.46).

[37] CBER Provisional Decision, para. 8.30.

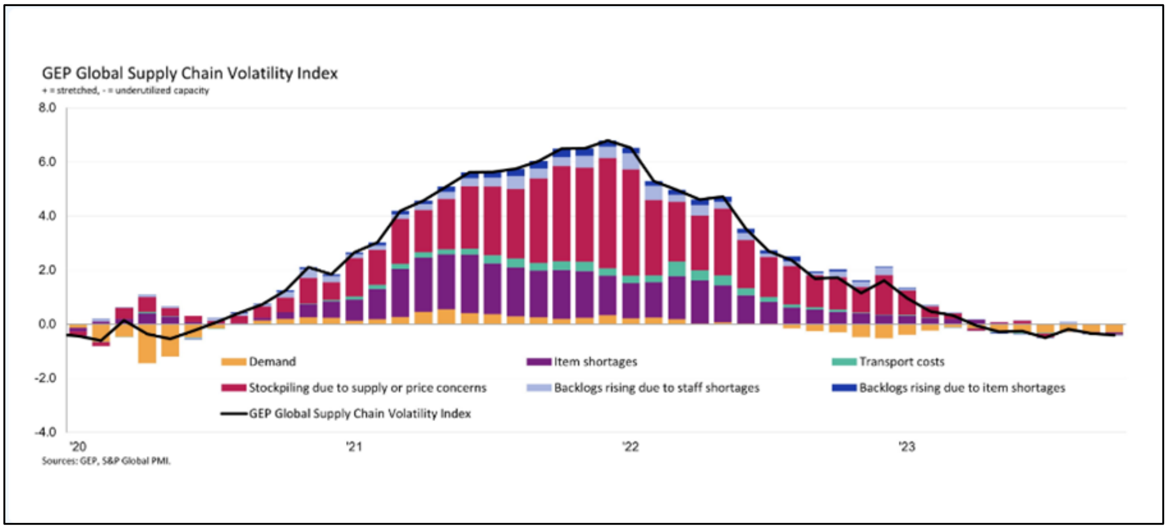
[38] BIFA, Response to the Liner Shipping Consortia Block Exemption Regulation Document, 22 February 2023, para. 4.7.4 and fn. 36.

[39] BIFA, Response to the Liner Shipping Consortia Block Exemption Regulation Document, 22 February 2023, fn. 36.

[40] CBER Provisional Decision, para. 8.38.

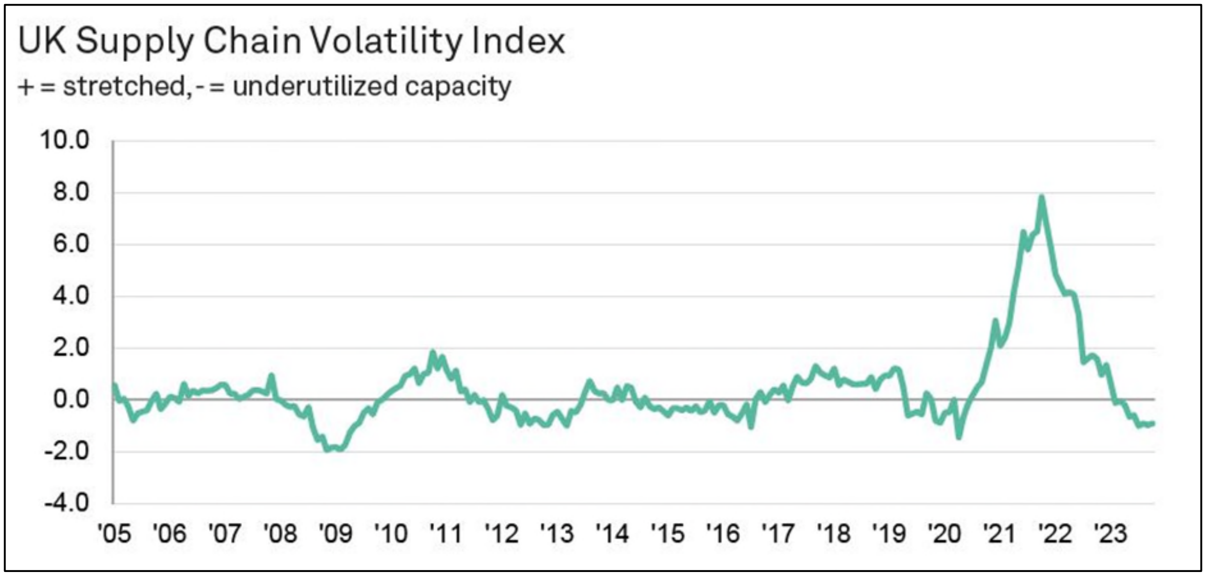
Then, starting in mid-2020, demand for goods increased substantially, especially in the U.S. So too did supply chain volatility, due to multiple trade imbalances as shown in the Global Supply Chain Volatility Index (Figure 2 below). Liner shipping capacity was rapidly deployed but inland operations could not keep up for a variety of reasons including labour shortages. Port congestion and other logistics bottlenecks subsequently absorbed much of the additional shipping capacity that was deployed throughout 2021 and into 2022. The UK was no different and experienced many of these supply chain stresses (see chart below). These resolved as the pandemic receded, as goods demand moderated, rebalancing with a reopened service sector and as logistics sector constraints unwound.

Figure 2 – Global Supply Chain Volatility Index[41]



[41] GEP, Global Supply Chain Volatility Index, available at: https://www.gep.com/knowledge-bank/global-supply-chain-volatility-index.

Figure 3 – UK Supply Chain Volatility Index[42]

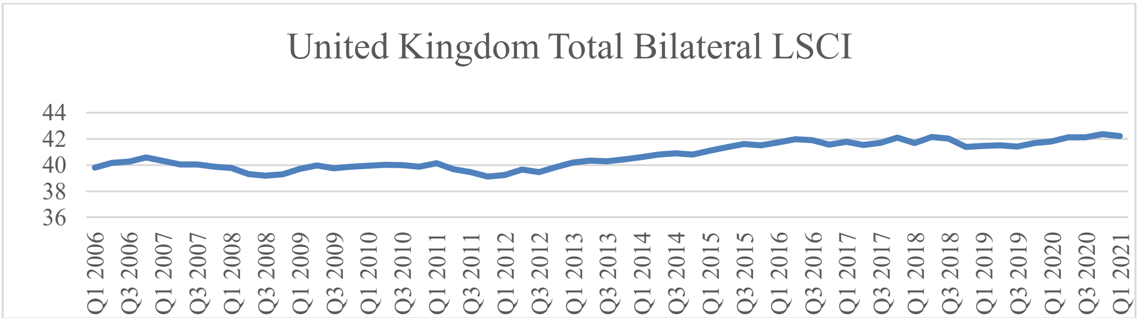


29. If we look, however, at longer term trends and particularly in the period since 2012, which has seen increased use of consortia by shipping lines, a substantially more positive picture can be discerned with regard to the UK's liner shipping connectivity.

30. UNCTAD's Liner Shipping Bilateral Connectivity Index (LSBCI) indicates a country's integration level into global liner shipping networks. This considers the number of direct shipping services between two countries, the number of common connections involving one transshipment, the number of services and levels of competition of those routes and the size of vessels that are deployed on it. UNCTAD indicates a strongly positive trend in the UK's bilateral connectivity for over a decade.

[42] GEP, Global Supply Chain Volatility Index, available at: https://www.gep.com/knowledge-bank/global-supply-chain-volatility-index.

Figure 4 – United Kingdom Total Bilateral LSCI[43]



31. Indeed, the Associations would reiterate here the long-term outlook specific to the maritime sector, as discussed above at paragraph 11. This means it is not credible to focus on one brief and unprecedented period in order to draw conclusions on a broader consistent trend overall.

32. In the CMA's other block exemption reviews to-date, it has consistently characterised the appropriate standard of assessment by, first, acknowledging the purpose of block exemptions in reducing the resource burden on the CMA because the *"various conditions of the current block exemption ensure that it is unlikely to apply to agreements that may give rise to* ***significant*** *competition concerns"*;[44] and second, evaluating the presence of restrictions of competition.[45] This determines the necessary intensity of review under the exemption criteria, namely whether it is likely that the pro-competitive gains generated by the agreement will outweigh its anticompetitive effects.

33. If the CMA's Sufficient Certainty Standard is applied to its final decision, the CMA risks establishing a legal threshold (or at least a standard of assessment) for any future block

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[43] This chart has been prepared by WSC based on a table presented by the UNCTAD Stat Data Centre which shows the liner shipping bilateral connectivity index (quarterly) on the basis of single pairs at: https://unctadstat.unctad.org/datacentre/dataviewer/US.LSBCI. The chart therefore presents the sum of all UK bilateral connections.

[44] CMA Recommendation, *Vertical Agreements Block Exemption Regulation*, 3 October 2021, para. 3.4. See also, CMA Recommendation, *The retained Horizontal Block Exemption Regulations*, 28 June 2022, para. 3.5 (combining two reviews); CMA Recommendation, *Motor Vehicle Block Exemption Regulation*, 4 October 2022, para. 2.6. The CMA made the same comment in the CBER Proposed Recommendation at para. 1.7.

[45] For instance, the issue of whether resale price maintenance should continue to be explicitly defined as a hardcore restriction in the Verticals Block Exemption Regulation, ultimately proposing to retain it, with clarification in subsequent guidance that the CMA *"remains open to considering, carefully and objectively, any efficiency arguments made in the course of any investigations under the Act"*: CMA Recommendation, *Vertical Agreements Block Exemption Regulation*, 3 October 2021, paras. 5.11-5.12.

exemption orders that (i) is not required under the CA98; (ii) does not feature in pre-Transition EU case-law, or UK precedent; (iii) has not been applied in other CMA reviews of the Retained EU Block Exemptions;[46] and (iv) is based on an inadequate evidence base focused on the period of the pandemic during which global supply chains faced unprecedented challenges, disregarding the pro-competitive and efficiency-enhancing evidence and experience on which the CBER was founded over the preceding 25 years.

E. Even where the CMA is uncertain of the efficiency-enhancing benefits of consortia, it need not apply a higher evidential standard as a means of curtailing the availability of a block exemption.

34. It is open to the CMA to adopt the powers necessary to address any future concerns on both a general and an individual basis.

35. First, in its January 2023 recommendation to renew the CBER, the CMA envisaged the inclusion of a provision permitting the CMA to cancel the benefit of the block exemption in individual cases, per section 6(6)(c) CA98.[47] That right would most likely have mirrored a corresponding provision in the Vertical Agreements Block Exemption Order, and the R&D and Specialisation Block Exemption Orders.[48] The CMA has not provided any explanation as to why such a provision would not be workable and sufficient to address potential future concerns in the present case as a more proportionate alternative to the expiry of the Retained CBER.

36. Second, in its January 2023 recommendation, the CMA also envisaged including an obligation on businesses to supply the CMA with information in relation to relevant agreements to which they are a party, again similar to the Vertical Agreements Block Exemption Order, and the R&D and Specialisation Block Exemption Orders.[49]

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[46] The CMA has conducted four reviews of the Retained EU Block Exemptions to-date, opting in each case to recommend the adoption of an equivalent domestic block exemption order.

[47] CBER Proposed Recommendation, paras. 6.3-6.4, citing Section 6(6)(c) CA98: *"A block exemption order may provide […] (c) that if the CMA considers that a particular agreement is not an exempt agreement, it may cancel the block exemption in respect of that agreement"*.

[48] CBER Proposed Recommendation, para. 6.3.

[49] CBER Proposed Recommendation, paras. 6.5-6.7.

37. Third, given the major departure from established policy that non-renewal of the EU CBER signifies (indeed, a major departure from the CMA's own recommendation in January 2023), the UK could instead adopt a 'wait-and-see' approach. The Associations note in this regard that, in addition to its powers to 'renew', it is always open to the Secretary of State to 'revoke' a block exemption order.[50]

38. This would allow the CMA to test certain assumptions which have shaped the CBER Provisional Decision, for instance, its assertion that it is "unlikely" that routes would be redesigned so that they called exclusively at UK ports.[51] Indeed, in this particular respect, the benefits of the 'wait-and-see' approach are evident from a comparison of the CMA's conclusion on costs now and in the CBER Proposed Recommendation:

- Now the CMA asserts that *"[i]t 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."*[52]

- In reaching this conclusion, it does not have regard to, or otherwise contradict, its provisional assessment in the CBER Proposed Recommendation regarding the "*flow-on effects to UK consumers as the costs associated with transhipment can impact the cost of goods."*[53]

39. The Associations would cite one example here in particular of potential misconceptions presented to the CMA by third parties. According to Hutchison Ports (which operates the port of Felixstowe), the per unit cost of port operations has increased as a result of larger vessels.[54] However, any analysis of the effects of port calls by larger ships should take into account the costs of servicing smaller vessels which call more frequently than larger vessels. Other costs levied against ships calling at Felixstowe for instance, have in fact increased, *e.g.*, a 13.4% increase in mooring costs across all vessel sizes between 2022 and

[50] Section 8(5) CA98, as applicable to domestic block exemption orders made pursuant to section 6 CA98, and section 10A(5) CA98, as applicable to 'retained' block exemption orders.
[51] CBER Provisional Decision, para. 9.22(b).
[52] CBER Provisional Decision, para. 9.22(b).
[53] CBER Proposed Recommendation, paras. 4.18-4.19.
[54] CBER Provisional Decision, para. 8.24 and fn. 74.

2023. But in any event, these increases concern categories of costs which are recoverable by ports; it is not credible therefore to claim that the use of larger vessels has any negative financial impact on port operations.

40. Indeed, the Port of Felixstowe has recently responded to the use of larger vessels to deepen the port and *"improve access for the world's largest container ships"*.[55] The project *"reinforces Felixstowe's position as one of Europe's leading ports for the latest generation of mega vessels. It provides levels of access that are unequalled anywhere else in the UK"*[56] and represents *"a significant financial investment by the Authority to ensure this vital UK gateway remains competitive and further safeguards the UK's position as a major trading nation"*.[57]

41. Nonetheless, the CMA asserts that *"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"*.[58] But, given the Government's forecast that global maritime volumes will treble by 2050 with the consequent expectation that the UK's dependence on the shipping trade for almost 95% of its goods will continue, it should provide the regulatory support and policy signals to encourage the investment in infrastructure that this expansion will require. Moreover, the Associations would reiterate the position explained above at para. 11 that the *"maritime sector operates on a longer-term timescale to many other transport modes"*.

42. Accordingly, maritime policy and strategy now entails an ever-closer collaboration between industry and Government, which would benefit from greater, and not lesser, regulatory and legislative support.

[55] *Port of Felixstowe Deepening Complete*, 4 October 2023, available at: https://www.portoffelixstowe.co.uk/press/news-archive/port-of-felixstowe-deepening-complete/.
[56] Comments from Robert Ashton, Chief Operating Officer of the Port of Felixstowe, *Port of Felixstowe Deepening Complete*, 4 October 2023.
[57] Comments from Sarah West, Chief Executive of Harwich Haven Authority, *Port of Felixstowe Deepening Complete*, 4 October 2023.
[58] CBER Provisional Decision, para. 9.22(b).

III. THE BENEFITS OF CONSORTIA ALSO ALIGN WITH THE UK'S NET ZERO STRATEGY

43. In the November 2022 Submission, the Associations explained how consortia contribute to advancing the UK's net zero strategy, with the challenges of decarbonising transportation in the UK having never been more salient.

44. The Government has since announced further green trade initiatives relevant to maritime shipping:

- In March 2023, the Government updated its 2019 Green Finance Strategy setting out *"how continued UK leadership on green finance will cement the UK's place at the forefront of this growing global market, and how we will mobilise the investment needed to meet our climate and nature objectives"*.[59]

- A further round of the Clean Maritime Demonstration Competition initially launched in March 2021: which will allocate up to £34 million for technology demonstrations, system demonstrations, feasibility studies and collaborative R&D trials in clean maritime solutions.[60]

- The expansion of the UK's Emissions Trading Scheme ("**UK ETS**") to include domestic maritime transport.[61]

- A commitment to *"publish the updated Clean Maritime Plan by the end of 2023. to accelerate maritime decarbonisation and reduce the environmental impact of the maritime sector"*.[62]

45. The UK is therefore clearly advancing its environmental initiatives to facilitate a broader goal of being "*a world leader in zero emission shipping"*.[63] This forms another critical

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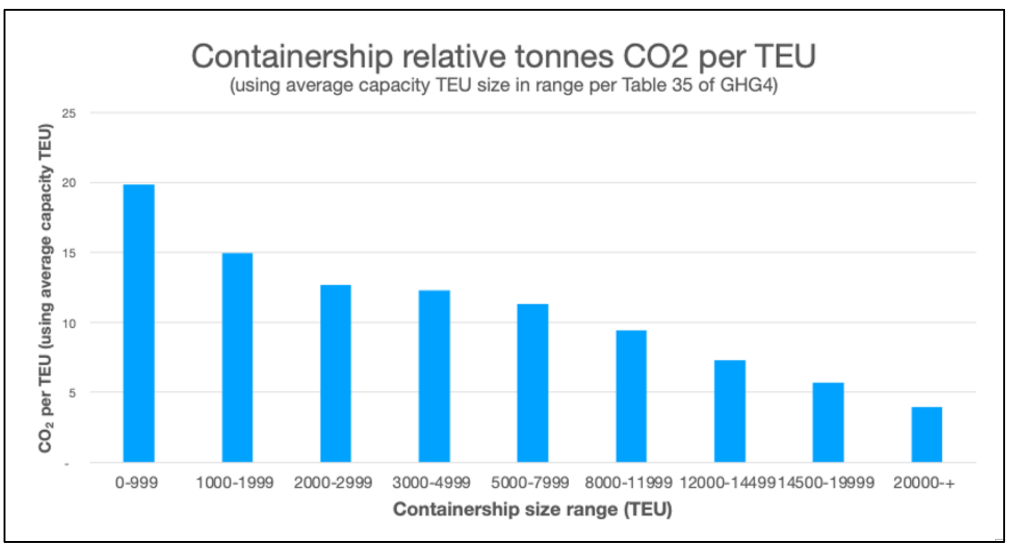
[59] *Mobilising Green Investment – 2023 Green Finance Strategy*, March 2023, para. 4.
[60] https://apply-for-innovation-funding.service.gov.uk/competition/1647/overview/8f7f5f02-aae9-4e7d-9ce3-bea08eaeb9e4 and https://www.gov.uk/government/publications/clean-maritime-demonstration-competition-cmdc
[61] Developing the UK Emissions Trading Scheme: Main Response, June 2023, p. 101, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1166812/uk-emissions-trading-scheme-consultation-government-response.pdf
[62] Maritime 2050: Government Response, p. 6.
[63] Transport Committee Report, para. 44.

component of the Government's renewed focus on delivering its Maritime 2050 Strategy.[64] The Associations have explained the contribution of consortia and the Retained CBER to those UK-specific objectives (see November 2022 Submission, paras. 102-107), confirming the position expressed in the recitals to the Retained CBER that consortia *"help to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity"*.[65]

46. Consortia optimise vessel utilisation, thereby reducing emissions per cargo unit. These efficiencies and the ability to deploy the most appropriate vessels for a given trade extend across all ship sizes. However, the largest vessels are often the most efficient (and least polluting) on a per-cargo-unit basis. The International Maritime Organisation's Fourth Greenhouse Gas Study[66] shows that larger containerships can reduce CO2 emissions per TEU by two-thirds compared to smaller containerships. As consortia enable carriers to operate larger ships than they could viably operate alone, they are indispensable to the fight against climate change.

Figure 5 – Relationship between size of containership and CO2 emissions per TEU[67]



[64] Transport Committee Report, Chapter 4.
[65] Retained CBER, recital 5.
[66] IMO's Fourth Greenhouse Gas Study, Full Report.
[67] This chart has been prepared by WSC based on a table presented in the IMO's Fourth Greenhouse Gas Study (see Full Report, Table 35, page 99) which shows (among other data points) CO2 emissions totals by containership size, reported in tonnes CO2 by vessel TEU capacity.

47. Accordingly, any policy decision that would impede carriers' ability to cooperate via consortia – for instance, by removing or limiting the Retained CBER, a compliance tool which has functioned well for decades – would directly undermine the UK's environmental objectives.

48. By contrast, while the CMA presents certain aspects of this evidence alongside comments from other third parties,[68] it does not explain how that evidence leads to a conclusion that consortia do not continue to *"help to promote technical and economic progress"* and more environmentally sustainable shipping.[69] Absent independent analysis or verification, including in a UK context, the CMA instead resorts to citing only the EC's findings (*e.g.*, on the use of larger vessels and liners' investment decisions).[70] In particular, it does not provide an evidence-based assessment of how it has determined that certain third party comments and the EC's findings disprove its initial proposition that *"[o]perating a joint service can in principle give rise to efficiencies"* and 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"*.[71] Nor does the CMA acknowledge the paper prepared by RBB Economics and submitted to the CMA on 24 July 2023 which addresses an alleged concern raised by certain stakeholders that the reduction in deep-sea shipping emissions achieved by consortia have been neutralised or outweighed by an increase in emissions in other parts of the supply chain.

49. The UK's commitment to additional objectives reflects the long-tail nature of environmental targets as they contribute to an overall net zero 2050 objective. For this reason, as the Government acknowledges, the *"environment theme"* requires close collaboration between industry and the Department for Transport, but *"tackling emissions is still seen as the industry's biggest challenge"*[72] and, *"[c]ompared to other transport modes, maritime arguably faces a greater challenge to reach net zero"*.[73]

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[68] CBER Provisional Decision, paras. 8.33-8.37.
[69] Retained CBER, recital 5.
[70] CBER Provisional Decision, paras. 8.35 and 8.37.
[71] CBER Provisional Decision, paras. 8.11 and 8.34.
[72] Transport Committee Report, para. 46.
[73] Transport Committee Report, para. 55.

50. The scale of the challenge is also recognised at a global level. The International Maritime Organization's target is to reduce emissions from international shipping by at least 50 per cent by 2050.[74] The removal of the Retained CBER will make it harder to form vessel sharing arrangements that generate many of the climate efficiencies in shipping needed to reach these targets.

51. Accordingly, the standard of 'sufficient certainty' which the CMA claims must be satisfied in the present case (see further, paras. 23-33 above) does not reflect the broader challenging context of the UK's (and the world's) environmental targets for the shipping industry. A more appropriate framework for the CMA's analysis of environmental benefits is one which acknowledges (i) the inherent uncertainties facing the maritime industry; and (ii) that stakeholders are only capable of a necessarily incremental achievement of environmental targets. That framework also best aligns with the recitals of the Retained CBER referenced above at para. 45, as well as the legal framework addressed at para. 18 above.

52. This is especially important given that *"[o]ne of the main requests [the Government] has heard from the sector is for greater clarity about decarbonisation, how to reach the net zero 2050 target and what short- and medium-term measures and targets the sector should be working to"*.[75]

53. The removal of a UK-specific CBER will only increase such uncertainty among carriers, a problem which would be exacerbated by the expiry of the CBER.

IV. THE CONTRIBUTION OF CONSORTIA TO UK TRADE AND ENVIRONMENTAL POLICY CANNOT BE GUARANTEED IN THE FACE OF LEGAL UNCERTAINTY

54. Absent a UK-specific CBER, the CMA has only confirmed that carriers *"would need to consider the application of an alternative block exemption (such as the specialisation block exemption), or [...] self-assess compliance of the agreement with the Chapter I*

[74] Transport Committee Report, para. 52.
[75] Transport Committee Report, para. 52.

prohibition" by reference to the UK Horizontals Guidance.[76] Unlike the EC, the CMA apparently does not endorse the position expressed in the EC's Staff Working Document that, as regards the specialisation block exemption, *"[t]he reference to the joint operation of assets through which a service is provided indicates that consortia are a form of joint production agreement that may be block-exempted if they fulfil the conditions set out in the revised Specialisation Block Exemption Regulation"*.[77]

55. The Associations maintain their submissions on the legal uncertainty that lapse of the Retained CBER will create.[78] The fact that carriers calling at EU ports will now be liable to undertake self-assessments under EU law does not justify the creation of additional legal uncertainty in the UK. Indeed, there are no grounds to assume that a piece of post-Brexit legislation, the Retained CBER, would, if renewed in the form of the UK's first consortia block exemption, *"be of significantly less value"* following the execution of a self-assessment under EU competition law.[79]

56. In this respect, the CMA seeks to justify its claim that such self-assessments are *"likely to be broadly similar"* by reference to the geographic scope of deep-sea shipping markets, *e.g.*, from North America to Northern Europe, or the Far East to Northern Europe.[80]

57. But as demonstrated above, any assessment of UK-specific efficiencies, for instance, will need to be closely tailored to UK markets, trade and environmental policies. In turn, the CMA should ensure that its final recommendation to Government is informed by an assessment as to whether renewal or expiry of the CBER will best "*<u>support investment, innovation and growth</u> by promoting competitive markets [and] steps to increase the <u>strength of competition across the UK economy</u>"*.[81] Such an assessment is wholly absent from the CMA's provisional decision.

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[76] CBER Provisional Decision, para. 10.2.
[77] 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)*, 10 October 2023, SWD(2023) 671 final.
[78] November 2022 Submission, paras. 128-144.
[79] CBER Provisional Decision, para. 9.25.
[80] CBER Provisional Decision, para. 9.25(b).
[81] Strategic Steer 2023.

58. Equally, the CMA has assumed that many consortia already live with the uncertainties caused by having to self-assess. It asserts that *"it is clear that a large number of consortia already operate above the market share threshold […] [and] 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"*.[82] The CMA bases this statement on the EC's approach to the application of the market share threshold to consortia that operate on more than one market. Yet the Associations have already presented ample evidence indicating that a significant number of consortia operating on trades to/from Europe are likely to fall below the applicable 30% market share threshold (see November 2022 Submission, RBB Report I, and the further submission of WSC and ASA of 17 October 2023, paras. 4-7).

59. The UK Government has the opportunity based on the evidence provided to it during the Retained CBER review, to consider whether it should use its post Brexit regulatory freedom to retain this proven transport efficiency tool. Doing so will contribute now more than ever to the growth and sustainability of a liner shipping sector at the service of UK trade and consumers seeking the opportunities of the new global economy.

V. CONCLUSION

60. For all of the above reasons, the Associations respectfully request that the CMA recommend to the Secretary of State replacement of the Retained CBER with a UK equivalent without amending any of its provisions. The Associations remain at the CMA's disposal for any further dialogue related to its final decision.

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[82] CBER Provisional Decision, para. 9.13.