

UK COMPETITION LAW: LINER SHIPPING CONSORTIA BLOCK EXEMPTION

Final report

CMA172con
09 February 2024

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1. Summary

- 1.1 On 17 November 2023, the CMA published a provisional decision that it would not recommend to the Secretary of State for Business and Trade that the assimilated Liner Shipping Consortia Block Exemption Regulation (the 'Assimilated CBER')¹ be replaced with a Liner Shipping Consortia Block Exemption Order (UK CBEO) when it expires on 25 April 2024 (the 'Provisional Decision'). The CMA received seven responses providing feedback on the Provisional Decision.²
- 1.2 Having carefully considered stakeholders' feedback on the Provisional Decision, the CMA has made a final decision not to recommend to the Secretary of State for Business and Trade that the Assimilated CBER be replaced with a UK CBEO when it expires on 25 April 2024.
- 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 Assimilated CBER.
 - Section 3 summarises the feedback the CMA received on its Provisional Decision.
 - 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 Assimilated CBER, including the rationale for its introduction and amendments made over time.

¹ The CMA previously referred to the block exemption as the "Retained CBER". Under the Retained EU Law (Revocation and Reform) Act 2023, what was previously "retained EU law" has become "assimilated law" from 1 January 2024. "Assimilated law" is domestic law which was previously retained EU law, but without the application of the EU law interpretive features applied to retained EU law by the European Union (Withdrawal) Act 2018 - namely, supremacy, general principles of EU law and rights retained under section 4 of the European Union (Withdrawal) Act 2018.

² Non-confidential versions of these responses are available on the relevant CMA webpage. The Provisional Decision in November 2023 followed an earlier consultation in January 2023, in which the CMA sought views on a proposal to recommend replacement of the Assimilated CBER when it expires on 25 April 2024 with a UK CBEO.

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

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.³
- 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.⁴
- 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

³ The Chapter I prohibition is set out at section 2 CA98.

⁴ 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.

Assimilated CBER

2.7 The Assimilated 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 assimilated into UK law following the UK’s withdrawal from the EU at the end of the Transition Period.⁵

2.8 The Assimilated 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 Assimilated CBER are included in the following section.

The CMA’s review of the Assimilated CBER

2.9 The Assimilated 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).⁶

⁵ The Assimilated 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.

⁶ 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 Assimilated 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 Assimilated CBER when it expires.⁷
- 2.12 In January 2023, the CMA consulted on a proposal to recommend the replacement of the Assimilated CBER with a UK CBEO (the ‘January 2023 Consultation’).
- 2.13 In November 2023, the CMA published its Provisional Decision not to recommend to the Secretary of State for Business and Trade that the Assimilated CBER be replaced with a UK CBEO when it expires on 25 April 2024. The CMA received seven 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.

⁷ The Assimilated 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 assimilated 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 The CMA received seven responses to the consultation on its Provisional Decision not to recommend to the Secretary of State for Business and Trade that the Assimilated CBER be replaced with a UK CBEO, using their powers under the CA98.⁸

Table 2: Respondents to the CMA’s November 2023 Provisional Decision

Respondent	Description
British International Freight Association (‘BIFA’)	Trade association representing freight forwarders.
Global Shippers Forum (‘GSF’)	Trade association for cargo owners.
International Federation of Freight Forwarders Associations (‘FIATA’)	Trade association representing members of the freight forwarding and logistics industry.
Logistics UK	Trade association representing businesses engaged in logistics.
Members of THE Alliance	THE Alliance is an East-West consortia shipping alliance.
A joint response by the UK Chamber of Shipping, World Shipping Council (‘WSC’), International Chamber of Shipping (‘ICS’) and the Asian Shipowners’ Association (‘ASA’) For brevity, we will refer to this joint response as the response from the WSC.	UK Chamber of Shipping is a trade association representing liners. WSC is a trade association for the liner shipping industry. ICS is a trade association for shipowners and operators. The ASA is a trade association for shipowners in Asia.

⁸ 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 Assimilated CBER should be replaced with a UK CBEO, made using their powers under the CA98. The CMA received ten responses to the January 2023 Consultation, a summary of which was included at paragraphs 3.4 to 3.6 of the Provisional Decision and which is set out in this Final Decision for ease of reference at **Annex A**.

A freight-forwarder	A submission from a UK freight-forwarder which requested to remain anonymous.
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- 3.2 The CMA also received a submission from a liner shipping company in which it commented on its ability to operate profitably larger vessels outside of consortia. The company explained that the submission conveyed aspects of its strategy, and therefore requested that the submission was not published.
- 3.3 The CMA also met certain stakeholders to understand their feedback on the Provisional Decision in further detail.
- 3.4 This section provides a high level summary of the submissions made on the CMA's Provisional Decision. We refer in further detail to the feedback received where relevant to the analysis in sections 8 and 9 below.
- 3.5 Logistics UK, the British International Freight Association, the Global Shippers Forum and the International Federation of Freight Forwarders Associations and the submission from a freight-forwarder expressed support for the CMA's Provisional Decision. The reasons given included:
- (a) Broader market developments mean that it is appropriate to consider consortia on a case-by-case basis rather than providing for automatic exemption.⁹ These included the diversification of liner shipping companies into other part of the logistics market.¹⁰
 - (b) The CBER has resulted in worse outcomes for users of liner-shipping services, including a loss of connectivity and rate increases.¹¹
 - (c) There is insufficient certainty on the benefits of consortia to warrant a block exemption.¹²
 - (d) The costs of self-assessment for liner-shipping companies will not be overly burdensome.¹³ The cost efficiencies to shipping liners of cooperation through consortia are sufficiently large to outweigh the costs of self-assessment under competition law (as demonstrated by the

⁹ See the responses from Logistics UK, FIATA and BIFA.

¹⁰ See the responses from Logistics UK and FIATA.

¹¹ See the response from FIATA.

¹² See the response from BIFA, Logistics UK, and the GSF.

¹³ See the response from Logistics UK and GSF.

present participation of liners in consortia which exceed the market-share cap for exemption under the existing CBER).¹⁴

3.6 The WSC and THE Alliance disagreed with the CMA's Provisional Decision. The reasons given included:

- (a) The CMA has unduly restricted its analysis by applying an impossibly high standard of "sufficient certainty" that consortia will produce efficiencies outweighing their potential impact on competition.¹⁵
- (b) There is a lack of clear evidence to cast doubt on the benefits of consortia.¹⁶
- (c) The CMA has failed to appreciate the value of a UK block exemption, even in circumstances where there is no block exemption in the EU.¹⁷

¹⁴ See the response from GSF.

¹⁵ See the response from the WSC.

¹⁶ See the response from THE Alliance and the WSC.

¹⁷ See the response from THE Alliance and the WSC.

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.¹⁸ 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’¹⁹), specialised, and general cargo may also be used for liner shipping.²⁰
- 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.²¹ 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

¹⁸ Article 2(2) of the Assimilated 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*’.

¹⁹ Roll-on/roll-off.

²⁰ 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.

²¹ 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.²²

- 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 1966.²³ Global container port throughput grew from 36 million twenty-foot equivalent units (TEU) in 1980 to 866 million TEU in 2022.²⁴ 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 2022.²⁵

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 2022.²⁶ 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 2023.²⁷ Three of the UK’s ports also rank within the top 100 best connected globally: Felixstowe (36), Southampton (42), and London Gateway (51).²⁸ 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 2013.²⁹
- 4.7 As of September 2022, 91 services operated by liners made calls at UK ports, with 32 of these via consortia.³⁰ The total capacity in TEU of liner services reaching UK ports as of September 2022 stood at 412,830, with around 70%

²² 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.

²³ 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.

²⁴ See [World Container Throughput, 1980-2022 | Port Economics, Management and Policy \(porteconomicsmanagement.org\)](https://www.porteconomicsmanagement.org)

²⁵ UNCTAD (2022) *Review of Maritime Transport 2022*, p138.

²⁶ This is 12% higher than tonnage received in 2012. Figures taken from the Department for Transport’s [Port and domestic waterborne freight statistics \(PORT\)](#).

²⁷ 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).

²⁸ Q2 2023 UNCTAD LSCI figures, accessible [here](#).

²⁹ The Port of Tilbury’s place in UNCTAD LSCI rankings has declined from 108 in Q2 2014 to 201 in Q2 2023.

³⁰ 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.³¹

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

³¹ 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.³²

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.³³ Conferences were organised in a variety of ways, and also featured sailing quotas, revenue pooling, and port allocation.³⁴ 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 2001.³⁵

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.³⁶ 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.³⁷

5.4 The conference system came under increased antitrust scrutiny in the late 1990s and early 2000s.³⁸ Following a review launched in 2003, the block

³² As noted above, the Assimilated CBER is one of the 'assimilated exemptions' from EU law that was assimilated into 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.

³³ 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.

³⁴ William Sjoström (2009) "Working Paper: Competition and Cooperation in Liner Shipping", pp1-2.

³⁵ OECD (2002) "[Competition Policy in Liner Shipping: Final Report](#)", p18; William Sjoström (2004) "Ocean Shipping Cartels: A Survey" *Review of Network Economics* 3.2, pp107 – 134.

³⁶ 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.

³⁷ See European Commission press release [here](#).

³⁸ 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

exemption regulation for conference agreements was repealed in 2006, becoming effective in 2008 following a two-year transitional period.³⁹ 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.⁴⁰

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.⁴¹
- 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.⁴² 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.⁴³ Further details on more recent reviews of the EU CBER are included in the following section.

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.

³⁹ European Commission (2006) [Competition: repeal of block exemption for liner shipping conferences](#).

⁴⁰ 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.

⁴¹ 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.

⁴² OECD (2002) "Regulatory issues in International Maritime Transport", p18.

⁴³ 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 Assimilated 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 Assimilated 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 Assimilated 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 Assimilated 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.⁴⁴
- 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.⁴⁵ 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.⁴⁶
- 5.12 The Assimilated 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

⁴⁴ Assimilated CBER, Article 2(1).

⁴⁵ Assimilated CBER, Article 5.

⁴⁶ Assimilated CBER, Article 4.

revenues or the sharing of profits or losses.⁴⁷ 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.⁴⁸ Therefore, alliances can be seen as a ‘bundle of consortia’ operating globally across multiple trade routes.⁴⁹

- 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.⁵⁰ In 2022, an 88.8% share of total capacity on the Europe – Far East trade lane was carried as part of one of three global alliances.⁵¹ Before 2015, all alliances had a combined market share below 50% on the four main East – West routes involving Europe.⁵² The CMA notes that the current makeup of the alliances is likely to continue to evolve, which in turn will affect the share of overall capacity held by liners which participate in alliances. In this context, we note Maersk and MSC’s announcement in January 2024 that the 2M alliance will end in January 2025, and the more recent announcement of a cooperation agreement between Maersk and Hapag-Lloyd, with the result that Hapag-Lloyd will leave THE Alliance at the end of January 2025.⁵³

⁴⁷ OECD (2015) “[Competition Issues in Liner Shipping](#)”, p28.

⁴⁸ International Transport Forum (2018) “[The Impact of Alliances in Container Shipping](#)”, p10.

⁴⁹ ITF (2022) “[Performance of Maritime Logistics](#)”, *International Transport Forum Policy Papers, No. 106*, p32.

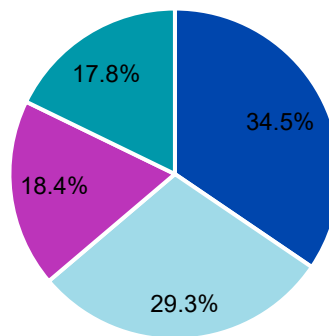
⁵⁰ Alphaliner Top 100, as of 24 January 2024, which gives share of TEU capacity on board operated ships based on existing fleet and orderbook. The proposed P3 Alliance between MSC, CMA-CGM, and Maersk failed to receive regulatory approval in China in 2014 but presaged the creation of the 2M Alliance 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.

⁵¹ RBB Economics (2022) *Response to the EC liner shipping CBER consultation*, p38. Individual members of the three global alliances also had additional shares of overall capacity, in arrangements outside the alliances.

⁵² See ITF (2019) “[Container Shipping in Europe Data for the Evaluation of the EU Consortia Block Exemption](#)”, p5.

⁵³ See a press release issued by Maersk on 17 January 2024 on its cooperation agreement with Hapag-Lloyd, available at the following link: <https://www.maersk.com/news/articles/2024/01/17/maersk-and-hapag-lloyd-are-entering-into-an-operational-cooperation>. Maersk and MSC had announced that the 2M alliance would discontinue in 2025 in a joint press statement issued on 25 January 2023, available at the following link: <https://www.msc.com/en/newsroom/press-releases/2023/maersk-and-msc-to-discontinue-2m-alliance-in-2025>.

Global liner shipping capacity in January 2024)
(source: Alphaliner Top 100)



- Capacity of 2M members 34.5%
- Capacity of Ocean members 29.3%
- Capacity of THE Alliance members 18.4%
- Capacity of liners not part of the three global alliances 17.8%

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- 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 alliances. As of 2021, around 13% of consortia were inter-alliance agreements.⁵⁵
- 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.⁵⁶ 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.⁵⁷

⁵⁴ Capacity shares based on data published by Alphaliner in January 2024

<https://alphaliner.axsmarine.com/PublicTop100/>

⁵⁵ 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.

⁵⁶ ITF (2018) “The Impact of Alliances in Container Shipping”, p15.

⁵⁷ OECD/ITF (2015) “The Impact of Mega-Ships”, pp20 – 22; ITF (2018) “The Impact of Alliances in Container Shipping”, pp14-15.

5.17 Of the ten largest liners by capacity share, only ZIM is not currently a member of one of the three global alliances.⁵⁸

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 Assimilated CBER.⁵⁹

⁵⁸ [Alphaliner Top 100](#), as of 24 January 2024.

⁵⁹ 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 22.

6. The objectives and recent reviews of the CBER

- 6.1 The Assimilated CBER was first adopted by the European Commission in 2009,⁶⁰ and was renewed without amendment in 2014 and 2020.⁶¹
- 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 2024.⁶² 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).⁶³

Table 2: Developments in the CBER

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

⁶⁰ 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](#).

⁶¹ See press notice [here](#).

⁶² 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').

⁶³ 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').

EU CBER reviewed by European Commission and renewed without change	2020
EU CBER assimilated into UK law via the European Union (Withdrawal) Act 2018, in amended form.⁶⁴	31 December 2020
European Commission decision to allow the EU CBER to lapse upon its expiry on 25 April 2024	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

⁶⁴ 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 of the 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 anymore.

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’*⁶⁵

- 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.⁶⁶
- 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.

⁶⁵ EC 2023 SWD, page 6

⁶⁶ Communication to the European Commission of 10 October 2023 on the expiry of the CBER.

7. Framework for the CMA's decision

- 7.1 In November 2023, the CMA published its Provisional Decision not to recommend replacement of the Assimilated CBER to the Secretary of State.
- 7.2 Having carefully considered the various responses received to the CMA's Provisional Decision, the CMA's final decision is not to recommend replacement of the Assimilated CBER to the Secretary of State. The CMA's reasons for this decision are set out in the following sections.
- 7.3 To recommend the replacement of the Assimilated 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. This reflects the legal basis on which the CMA may recommend to the Secretary of State that a block exemption be made.⁶⁷
- 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.

⁶⁷ Under section 6(1) CA98, the CMA may recommend a block exemption if agreements which fall within a particular category of agreement are, in the opinion of the CMA, likely to be exempt agreements (meaning agreements which are exempt from the Chapter 1 prohibition as a result of section 9 CA98).

- 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 Assimilated 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.
- 8.7 In response to the Provisional Decision, the WSC submitted that *'the CMA is not required to apply a more stringent standard of assessment than is required under Chapter I CA98'*, and that the CMA's approach *'unduly restricts [the CMA's] analysis by applying an impossibly high standard of "sufficient certainty" that consortia will produce efficiencies outweighing their potential impact on competition'*.
- 8.8 Given that a block exemption provides an automatic exemption from competition law for a whole category of agreements, it is appropriate for the CMA to require a degree of certainty that consortia covered by the exemption are *likely* to meet the criteria for Section 9 exemption. As explained above, this does not require an individual assessment of each potential agreement covered by the exemption. Similarly, it does not require the CMA to be certain in the sense of excluding any possibility that agreements covered by the exemption would not meet the criteria for Section 9 exemption as a general matter.
- 8.9 However, where the evidence is ambiguous or conflicting, it is appropriate for the CMA to decline to recommend a block exemption. This does *not* imply that the CMA considers that any given consortia agreement would not meet the criteria for individual exemption, nor that agreements within the overall category are *unlikely* to meet the criteria for individual exemption.
- 8.10 In adopting this approach, the CMA is not adopting a particular interpretation of the legal test established under CA98 for the recommendation of a block exemption. Rather, the CMA is describing the considerations to which it will have regard, as a matter of policy, in exercising its discretion to recommend a block exemption.

Main potential effects on competition

- 8.11 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 consortia.⁶⁸
- 8.12 Consortia that benefit from an exemption under the Assimilated 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 Assimilated CBER.
- 8.13 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.
- 8.14 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.

Main potential efficiencies

- 8.15 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:

⁶⁸ 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*).

(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.

8.16 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.

8.17 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.⁶⁹

8.18 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.⁷⁰ Operating as a joint service rather than individually may therefore expand the range of ports at which services call.

8.19 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, and they may potentially benefit from services calling at a wider network of ports.

8.20 For the purpose of considering the case for a block exemption, the CMA has described the main potential efficiencies which consortia may in general give rise to. The CMA recognises that a particular consortium may give rise to other efficiencies, based on the particular context in which they operate, and the nature of the cooperation.

8.21 Consortia may also have pro-competitive effects. The economies of scale made possible via operating in consortia may allow smaller liners to compete

⁶⁹ Response from the WSC, ICS, ASA to the January 2023 Consultation, p45; see also UNCTAD (2022) [Review of Maritime Transport 2022](#), p108; and International Maritime Organisation (IMO) (2020) *Fourth IMO Greenhouse Gas Study*.

⁷⁰ 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

- 8.22 Paragraphs 8.11 to 8.21 set out in general terms the main effects consortia may potentially have on competition, and the main efficiencies they may potentially give rise to.
- 8.23 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 8.27 to 8.36;
 - (b) Frequency of services and ports served - paragraphs 8.37 to 8.41;
 - (c) The environmental impact of liner shipping - paragraphs 8.42 to 8.48;
 - (d) The quality of liner shipping services - paragraphs 8.49 to 8.52.
- 8.24 In response to the Provisional Decision, the WSC submitted that 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 [...] against the limited forms of cooperation which are integral to the provision of a joint service'*.
- 8.25 However, the CMA is not restricting its assessment to the potential efficiencies in considering the issues listed in paragraph 8.23. Rather, through considering these issues, the CMA is considering whether it has sufficient certainty based on the available information that, in practice, these efficiencies outweigh any restrictions of competition that consortia give rise to.
- 8.26 In addition to considering the causal link between consortia and 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 8.54; and
- (b) The trend towards liners participating in markets in a vertical relationship to liner shipping – paragraph 8.55.

Price

- 8.27 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 2021.⁷¹ 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.⁷²
- 8.28 However, by October 2023, the SCFI stood at 918 points, indicative of how freight rates had largely returned to pre-pandemic levels.⁷³
- 8.29 The CMA published its Provisional Decision on 17 November 2023. Since then, the price of liner shipping services has increased significantly, following attacks by Houthi rebels against merchant and commercial vessels transiting the Red Sea, leading to disruption to global shipping. As of 12 January 2024, the SCFI stood at 2206.⁷⁴
- 8.30 Stakeholders representing the users of liners' services have argued that the increases in prices and profit during the Covid pandemic 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'*.⁷⁵ They have also argued that in addition to the increase to

⁷¹ UNCTAD (2022) *Review of Maritime Transport 2022*, p61.

⁷² UNCTAD (2023) *Review of Maritime Transport 2023*, p45.

⁷³ SCFI as of 20 October 2023.

⁷⁴ Another composite index of liner shipping prices, Drewry's World Container Index, showed a similar picture. The index stood at an average of \$1,420 in 2019, before the pandemic. By 26 October 2023, it stood at \$1342, returning to pre-pandemic levels from peaks of around \$10,000 in 2021. It has increased since the start of December, and stood at \$3,073 by 11 January 2024. See <https://www.drewry.co.uk/supply-chain-advisors/supply-chain-expertise/world-container-index-assessed-by-drewry>.

⁷⁵ 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."

freight rates, they also face increased surcharges and fees on independent and smaller operators.⁷⁶

- 8.31 One stakeholder 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.⁷⁷ THE Alliance submitted that evidence for this was lacking and that it doubted that any increased port costs would offset the efficiencies on the sea-leg of the journey through using larger vessels. Similarly, the WSC submitted that the possibility that larger vessels may increase unit costs for port operations represented an '*unsupported assertion*', and that in any event, it would be necessary to take into account the costs of servicing smaller vessels which call more frequently than larger vessels.⁷⁸
- 8.32 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.⁷⁹
- 8.33 Overall 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.
- 8.34 The WSC submitted an econometric report which aimed to separate out these causal factors. The report concludes that the increases in prices over the pandemic period 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

⁷⁶ Response from BIFA to the January 2023 Consultation. 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*.

⁷⁷ 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*'.

⁷⁸ Response by the WSC to the Provisional Decision. See also the response by THE Alliance to the Provisional Decision.

⁷⁹ Response from the WSC, ICS, ASA to the January 2023 Consultation, pp36–37; RBB Economics (2023) *Liner shipping consortia: Assessment of freight rate developments: Prepared for World Shipping Council*, pp8-17.

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.

8.35 The econometric report was prepared for the purpose of assessing the role consortia played in the increases in the price of liner shipping observed over the pandemic period. In contrast, 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 report's analysis estimates the impact of consortia presence on freight rates more generally.⁸⁰ The CMA therefore considers that the econometric report does have a bearing on this more general question of the impact that consortia have on prices, notwithstanding the narrower purpose for which the report was prepared. Whilst the report finds that in certain econometric specifications, the presence of consortia appears to have a downward effect on prices, no effect was observed in other econometric specifications, and the report does not suggest that the models in which a downward effect was observed are preferable to the other models. The report therefore does not provide clear evidence that consortia will have a downward effect on prices.

8.36 In response to the Provisional Decision, the WSC expressed concern that the CMA had relied on the *'brief and exceptional period of the global pandemic to claim that the benefits of consortia have not been proven with sufficient certainty'*. The WSC reiterated that the downward effect of consortia on prices can instead be demonstrated by the broader overall trends in the real prices for liner shipping over a 20 year period. However, as explained at paragraph 8.32, changes in the real prices of liner shipping over the long run will be the product of a wide range of factors, and cannot simply be attributed to the operation of consortia. Therefore, falls in the real price of liner shipping over the long run are not in themselves clear evidence that the efficiencies produced by consortia outweigh the impact of any restrictive effect they have on competition.

⁸⁰ The report states that it uses *'Ordinary Least Squares (OLS) regression framework to estimate the effect of consortia presence on freight rates for the period from January 2017 to September 2022 for the seven main European East-West and North-South trade routes'*.

Frequency of services and range of port calls

- 8.37 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.⁸¹
- 8.38 The UK's LSCI has experienced an overall increase since 2011 (although has remained relatively stable in the last three years).⁸² 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.⁸³
- 8.39 Stakeholders 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-2019.⁸⁴ On the other hand, the WSC has submitted that *'[i]t 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'*.
- 8.40 There are a number of factors which may contribute to overall increases or decreases in connectivity, including changing patterns of demand or the extent to which cargos are consolidated in larger vessels. In respect of developments in the last few years, the CMA recognises the impact of disruption due to the pandemic, and that it is likely that connectivity may have been similarly affected in circumstances where liner shipping companies did not cooperate through consortia. In terms of the long-run trend of increasing connectivity to the UK, the CMA is not in the position based on the available evidence to attribute a specific contribution to cooperation through consortia (whether positive or negative), amongst all the other potential factors that could affect connectivity. Thus, in contrast to the suggestion at paragraph 31 of the WSC's response to the CMA's Provisional Decision, the CMA does not

⁸¹ RBB Economics (2022) *Liner Shipping Consortia Block Exemption Regulation: an introductory note prepared at the request of the World Shipping Council*, pp9–10.

⁸² [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 below 89 in Q1 2023, but has since increased again to a score above 90 in Q4 2023.

⁸³ Container Shipping Industry: 2020 – 2021 supply and demand review prepared for the European Commission by MDS Transmodal. See figure 9.

⁸⁴ Response from BIFA to the CMA's January 2023 consultation. 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.

rely on the pandemic period to draw conclusions or dispute the broader trends in connectivity. Instead, the CMA assesses the difficulty in determining the specific contribution of consortia.

- 8.41 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.⁸⁵ It is clearer that operating in consortia is likely to 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.⁸⁶ 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*'.⁸⁷

Environmental benefits

- 8.42 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.⁸⁸ 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.
- 8.43 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.⁸⁹ Furthermore, as noted at paragraph 8.15, the CMA also recognises that operating in consortia may allow liners to operate larger vessels, due to the consolidation of demand across liners.

⁸⁵ If customers prefer not to switch between liners, then the ability for a given liner to offer greater frequency and coverage through a consortium 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.

⁸⁶ 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).

⁸⁷ UNCTAD (2022) *Review of Maritime Transport 2022*, p100.

⁸⁸ Response from the WSC, ICS, ASA to the January 2023 Consultation, pp44 – 46. Response from THE Alliance to the January 2023 Consultation, p.5. Response from the UK Chamber of Shipping to the January 2023 Consultation, p.2.

⁸⁹ See, for example, International Maritime Organisation (IMO) (2020) *Fourth IMO Greenhouse Gas Study*, p181, table 60.

- 8.44 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 consortium 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.⁹⁰
- 8.45 The clear correlation between the average size of vessels and whether they are operated within *alliances* does not however demonstrate that – absent the consortia – the liners in question would have tended to order smaller vessels. The CMA notes, for instance, that the cost-efficiencies of larger vessels may have made an independent contribution to these liners choosing to operate larger vessels, regardless of whether they were able to operate within consortia or on a standalone basis.
- 8.46 The CMA notes the European Commission’s finding that ‘*there is no clear evidence that the orders for larger vessels have been linked to the planned or actual membership in consortia*’, and that it has said that there are indications that liners may make decisions to invest individually in larger vessels.⁹¹ The CMA has however received a submission from a liner shipping company, stating that only through participation within a consortia does it have the possibility of operating large vessels profitably. Thus, while there is some evidence of a link between vessel size and being a member of a consortium, it is not conclusive.
- 8.47 Separate to the causal connection between consortia and the use of larger vessels, the CMA has also had regard to the possibility 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.⁹² 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.⁹³

⁹⁰ 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).

⁹¹ EC 2023 SWD, p41.

⁹² EC 2023 SWD, p50.

⁹³ The WSC submitted a paper prepared by RBB Economics titled ‘The Impact of the CBER on Supply Chain Emissions’. Alongside presenting evidence that cargoes have not been consolidated at hub ports, this paper also

8.48 In response to the Provisional Decision, the WSC submitted that the CMA had not provided an evidence-based assessment of how it had disproven the proposition that consortia can give rise to environmental benefits through the operation of consortia. However, the CMA has not found this proposition *disproven*. Our assessment concerns the degree of confidence we have that consortia will result in these efficiencies, based on the evidence considered as part of our review. For the reasons set out above, we recognise that environmental efficiencies may arise as a result of participation in consortia, but the evidence gives rise to some doubts as to the extent of the environmental efficiencies achieved.

Service quality

8.49 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.⁹⁴ 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.⁹⁵ The Global Shippers Forum referred to co-ordination between liners being used to selectively remove scheduled sailings to maintain profitability.⁹⁶

8.50 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 2019.⁹⁷ 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 2022.⁹⁸ This is, however, still below pre-pandemic averages.

8.51 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*

referred to the relative share of total sea transport in the EU between short-sea and deep-sea shipping remaining relatively constant over 12 years to 2021, which was evidence against the proposition that the use of larger vessels had increased the need for transshipment from hub ports using smaller vessels. Similarly, the paper presented evidence that the relative use of road, rail and inland waterway transport has not significantly increased over time.

⁹⁴ Response to the consultation submitted on 23 February 2023 on behalf of Logistics UK.

⁹⁵ Response from BIFA to the January 2023 Consultation.

⁹⁶ Response from Global Shippers Forum to the January 2023 Consultation.

⁹⁷ [Sea-Intelligence - Global Liner Performance report – 2021-FY](#).

⁹⁸ Schedule reliability figures from [Sea-Intelligence](#).

*shortages and port and hinterland congestion which removed effective capacity from the market.*⁹⁹

- 8.52 The CMA acknowledges that factors other than the use of consortia may have contributed to the significant deterioration of service quality in the pandemic. On the extent to which consortia exacerbated or mitigated these developments, the CMA has received conflicting evidence.¹⁰⁰

Wider market developments

- 8.53 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.
- 8.54 **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).¹⁰¹ The average number of liners serving any particular country has fallen from 18 to 13 from 2006 to 2022.¹⁰² As concentration has increased, there is an increased likelihood that separate horizontal cooperation agreements may involve participants that are common to multiple agreements.
- 8.55 **Vertical integration:** There is a trend towards liners participating in markets related to the deep-sea leg of the maritime transport market.¹⁰³ 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.¹⁰⁴
- 8.56 Both market developments are potentially relevant to the competitive assessment of horizontal cooperation via consortia. For example, in the case of increased concentration, the Assimilated CBER itself recognises that

⁹⁹ Response from the WSC, ICS, ASA to the January 2023 Consultation, p2.

¹⁰⁰ The CMA also notes that the European Commission's finding that it was '*difficult to assess the effect of consortia on the quality of services over the evaluation period*'. The European Commission noted that qualitative responses indicated that reliability depended on factors other than whether liners operated in consortia. However, it also noted comparing the reliability of the global alliances with wider industry averages did not show any robust trend, which it said illustrated the difficulty of concluding on the effect of consortia on service quality. See EC 2023 SWD, page 49.

¹⁰¹ See UNCTAD (2022) *Review of Maritime Transport 2022*, p xxvi

¹⁰² See UNCTAD (2022) *Review of Maritime Transport 2022*, p xxvi

¹⁰³ ITF (2022) "Performance of Maritime Logistics", International Transport Forum Policy Papers, No. 106, OECD Publishing, Paris.

¹⁰⁴ UNCTAD (2022) *Review of Maritime Transport 2022*, p138.

negative effects may derive from the existence of links between consortia through common membership.¹⁰⁵ 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, and the participation of liners in other parts of the supply chain, could alter liners' incentives which may result in a greater risk of foreclosure¹⁰⁶ and coordinated effects.¹⁰⁷

- 8.57 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

- 8.58 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 Assimilated CBER will produce efficiencies which outweigh their potential impact on competition.
- 8.59 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.
- 8.60 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

¹⁰⁵ Recital 12 of the Assimilated 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*'.

¹⁰⁶ For instance, where a firm uses its position in one market to harm the competitiveness of its rivals in the other.

¹⁰⁷ For instance, where a firm operating in an upstream and downstream market facilitates coordination by facilitating flows of information between rivals.

individually – be unlikely to satisfy the conditions for exemption under section 9 CA98.

- 8.61 In its response to the CMA's Provisional Decision, the WSC noted that when the CMA consulted in January 2023 on a proposal to recommend replacement of the CBER, the CMA had envisaged the inclusion of a provision enabling the cancellation of the benefit of the block exemption in individual cases. The WSC submitted that the CMA had not explained why inclusion of such a provision would not address potential concerns.
- 8.62 Under CA98, a block exemption order may provide for the CMA to cancel the block exemption in respect of a particular agreement if the CMA considers that the agreement would not meet the criteria for exemption under Section 9. Other UK block exemptions contain cancellation provisions of this kind, (reflecting the recommendations of the CMA).¹⁰⁸
- 8.63 Where the CMA has previously recommended the inclusion of cancellation provisions, the CMA has made clear that the provision was only likely to be used in 'exceptional circumstances'.¹⁰⁹ In defining the scope of a block exemption, the possibility cannot be excluded that agreements covered may not warrant individual exemption. A cancellation provision allows this risk to be mitigated.
- 8.64 In the case of consortia, it is not the CMA's assessment that, while consortia would generally warrant individual exemption, there remains a *possibility* that a new block exemption could cover an agreement which would not warrant individual exemption. The CMA's lack of certainty that consortia as a general matter would meet the criteria for Section 9 exemption is such that the use of a cancellation provision in these circumstances would not be appropriate and would undermine the very legal certainty a block exemption is intended to provide.

¹⁰⁸ See (i) Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022, article 13 (ii) Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022, article 15 and (iii) Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022, article 9.

¹⁰⁹ See (i) '[Vertical Agreements Block Exemption Regulation: CMA's recommendation](#)', paragraph 9.5 (ii) '[Motor Vehicle Block Exemption Regulation; CMA's recommendation](#)', paragraph 7.5, and (iii) '[The retained Horizontal Block Exemption Regulations – R&D and specialisation agreements; CMA's recommendation](#)', paragraph 7.6.

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 Assimilated 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 9.7 to 9.16.
 - (b) The impact of the Assimilated CBER in the UK, in the context of liners needing to carry out self-assessment of consortia agreements under EU competition law – paragraphs 9.17 to 9.32.
- 9.5 Stakeholders representing liners considered there was an additional advantage of maintaining a block exemption in the UK. They submitted that a decision not to replace the CBER in the UK might be treated as a signal that consortia should no longer be regarded as efficiency-enhancing and beneficial to consumer welfare. They said that this signal could impact whether other jurisdictions maintain their own antitrust immunities for consortia, including in jurisdictions where the framework for self-assessment is less developed, such that the absence of an immunity in those jurisdictions creates greater legal uncertainty.

- 9.6 The CMA's assessment of the case for a UK block exemption involves considering the alternative to a block exemption which would prevail in the UK, which is that liners would need to self-assess consortia agreements for individual exemption under CA98. It is for authorities and governments in other jurisdictions to make their own assessment of the benefits of antitrust immunity for consortia agreements, based on the alternatives which would exist in their jurisdictions.

Relevant factors

Self-assessment is already routine

- 9.7 For the Assimilated 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 Assimilated 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.
- 9.8 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).
- 9.9 A multi-trade consortium can benefit from exemption under the Assimilated 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).
- 9.10 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.
- 9.11 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.¹¹⁰

- 9.12 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 Assimilated CBER.¹¹¹ It is also consistent with the description of the exemption provided by the Assimilated 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 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 CBER would be consistent with the CMA's interpretation of how the market share threshold in the Assimilated CBER applies.
- 9.13 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.¹¹² The European Commission identified only 12 consortia operating on trade routes to North Europe which satisfied the market share threshold in the CBER.
- 9.14 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 9.10. 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

¹¹⁰ 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.

¹¹¹ 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).

¹¹² 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.

(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.

- 9.15 Therefore, even on the interpretation of the Assimilated CBER advanced by the liners, it is clear that a large number of consortia already operate above the market share threshold established in the Assimilated 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 Assimilated CBER would be unlikely to result in liners ceasing participation to a significant extent in these consortia (on the basis that the participating liners are already carrying out self-assessments).
- 9.16 Further, the consortia which currently *do* benefit from exemption under the Assimilated 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 Assimilated 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 CBER and the treatment of consortia under EU competition law

- 9.17 As explained at paragraph 4.3 above, liner shipping services generally serve a 'string' of ports, rather than connecting only two ports.
- 9.18 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.
- 9.19 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 Assimilated 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 Assimilated 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 Assimilated 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.

9.20 Stakeholders' feedback on the January 2023 consultation 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.

9.21 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

9.22 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 Assimilated CBER being continued as a UK CBEO.

9.23 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.¹¹³

(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.

9.24 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.

9.25 For these reasons, the CMA considers it is more likely that if the Assimilated 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.

9.26 The WSC noted that before it became clear that the EU CBER would lapse, the CMA had considered the impact of the UK CBER lapsing while the EU CBER continued in the January 2023 Consultation. In that consultation, the CMA had taken into account concerns that liners would be deterred from calling directly at UK ports, where there was a block exemption in the EU, but not in the UK. More goods would then need to be transhipped to the UK from the EU, resulting in higher costs.

¹¹³ In response to the Provisional Decision, the GSF stated that the likelihood of liners ceasing to serve the EU (or the UK) due to changes in competition law was remote, and Logistics UK stated that such an outcome was unlikely.

- 9.27 The WSC said that the CMA had not taken its previous position into account in its Provisional Decision, in which the CMA found it was unlikely liners would re-route services away from EU ports to take advantage of a UK block exemption, in circumstances where there was no EU block exemption.
- 9.28 However, the CMA's assessments of the two different types of regulatory divergence reflect the fact that the EU market is larger relative to the UK's, and that a higher overall proportion of the goods liners carry are destined for the EU. This asymmetry means it would be more burdensome for liners to re-route services to avoid EU ports, compared to re-routing services to avoid UK ports. This accounts for the difference in the CMA's assessment of the likely outcomes in the different scenarios.
- 9.29 In its response to the CMA's Provisional Decision, the WSC also suggested that the UK could adopt a "wait-and-see" approach by retaining a block exemption to see if routes were redesigned to call exclusively at UK ports, but did not produce any additional evidence to support the suggestion that this would take place. In considering whether a new block exemption would be preferable to consortia being assessed according to the ordinary provisions of competition law, the CMA has assessed the *likely* outcome of maintaining a block exemption. The CMA has concluded that it would not be likely that services would be re-routed to call only at UK ports, in the event a block exemption was maintained. It would not be appropriate to base a recommendation for the introduction of new legislation, given the CMA's assessment of the low likelihood that services would be re-routed, in case its analysis proved to be incorrect, and as a means to gather evidence.

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

- 9.30 The conclusion of the preceding section is that it would be unlikely that there would be changes in routes if the UK adopted a UK CBEO when the EU had allowed its CBER to lapse. Therefore, 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.
- 9.31 In these circumstances, the CMA considers that 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 consortium 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.

9.32 In response to the CMA's Provisional Decision, the WSC submitted that the self-assessment required to comply with UK competition law would be distinct from the self-assessment required under EU competition law, and would *'need to be closely tailored to UK markets, trade and environmental policies'*.

9.33 Assessing compliance with UK competition law would not be the exact same self-assessment as required under EU competition law. However, the CMA's conclusion that the UK self-assessment is unlikely to involve any significant additional compliance burden is based on broad overall similarity between the two regimes. The CMA recognises that this is the current position, and is contingent on the current degree of alignment between EU and UK law. We recognise that as EU and UK competition law develop over time, it is possible they may diverge in respect of their treatment of consortia. However, given the CMA's inability to predict whether and when any such divergence might arise, the CMA does not consider it appropriate to recommend the adoption of a UK CBEO. If EU and UK law did diverge over time, and depending on the nature of the divergence, the case for a UK block exemption may change, and the CMA may consider it appropriate to reconsider it.

Conclusion

9.34 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 CBE0 are assessed according to the ordinary provisions of competition law.

10. The CMA's final decision

- 10.1 **For the reasons set out above, it is the CMA's final decision that it will not recommend to the Secretary of State for Business and Trade that the Assimilated CBER be replaced by a new UK CBEO.** If the Assimilated CBER lapses,¹¹⁴ 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 Exemption¹¹⁵), or, if not, they would need to self-assess compliance of the agreement with the Chapter I prohibition.
- 10.2 In its response to the Provisional Decision, THE Alliance requested guidance on various aspects of this self-assessment, and on the applicability of the Specialisation Block Exemption. The CMA recognises the role guidance can play in supporting business to comply with competition law. 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*.¹¹⁶

¹¹⁴ There is a power under s.10A(1) CA98 for the Secretary of State to vary assimilated block exemption regulations, including by extending their expiry date.

¹¹⁵ Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022.

¹¹⁶ These guidance documents can be accessed at the following links: [Guidance on horizontal agreements](#) and [Guidance on environmental sustainability agreements](#). In respect of the Specialisation Block Exemption, the CMA notes the European Commission's statement in its evaluation of the EU CBEO on the applicability of the EU Specialisation Block Exemption Regulation to consortia. The European Commission referred in particular to the sixth recital of the EU Specialisation Block Exemption Regulation, which states that '*The preparation of services refers to activities carried out upstream of the provision of services to customers (for example, cooperation in the creation or operation of a platform through which a service will be provided)*'. (See footnote 79 of EC 2023 SWD). The UK's specialisation block exemption does not contain an equivalent recital. However, the CMA's Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements provides guidance on the application of the block exemption. The guidance states that '*Specialisation agreements benefiting from the exemption of the SABEO may also concern the preparation of services. The 'preparation of services' refers to activities upstream of the provision of services to customers (Article 2(1) of the SABEO). For example, a specialisation agreement for the creation or operation of a platform through which a service will be provided could be considered an agreement concerning the preparation of services*' (see paragraph 5.41).

Annex A: Summary of the responses received to the CMA’s consultation in January 2023 on its proposed recommendation to replace the Assimilated CBER with a UK CBEO.

1. 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 Assimilated CBER should be replaced with a UK CBEO, made using their powers under the CA98.¹¹⁷
2. The CMA received 10 responses to the consultation:

Respondent	Role in supply chain
British International Freight Association	Trade association representing freight forwarders
British Chambers of Commerce	A network and representative group for British businesses
British Ports Association	A trade association for British port authorities and operators.
DP World	Operator of ports in the UK, including Southampton and London Gateway
Global Shippers Forum	Trade association for cargo owners
Hutchison Ports	Operator of ports in the UK, notably Felixstowe
Logistics UK	Trade association representing businesses engaged in logistics
Members of THE Alliance	THE Alliance is an East-West consortia shipping alliance ¹¹⁸
UK Chamber of Shipping	Trade association representing liners
World Shipping Council ('WSC'), International	WSC is a trade association for the liner shipping industry

¹¹⁷ A copy of the consultation, alongside copies of the responses to the consultation, is available at the following link: [Retained Liner Shipping Consortia Block Exemption Regulation Consultation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/retained-liner-shipping-consortia-block-exemption-regulation-consultation).

¹¹⁸ The response was submitted on instructions of the four members of THE Alliance: Hapag-Lloyd, HMM, Ocean Network Express and Yang Ming.

Chamber of Shipping ('ICS') and the Asian Shipowners' Association ('ASA')	ICS is a trade association for shipowners and operators. The ASA is a trade association for shipowners in Asia.
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3. In summary, there were three broad categories of feedback.
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.¹¹⁹
 - (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.¹²⁰
 - (c) The current Assimilated 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.¹²¹
 - (d) There is a benefit in alignment with the EU antitrust rules.¹²² Alignment would avoid deep-sea routes calling only at EU ports, in order to avoid higher compliance burdens with operating in the UK.¹²³
5. Some respondents were neutral on whether the Assimilated CBER should be continued or expressed mixed views over the recommendation that the CMA should make. One respondent said that the number of liners covered by the Assimilated CBER had reduced, and that the absence of a block exemption would not prevent consortia agreements being entered into.¹²⁴ One respondent proposed alternative systems of regulation, such as replacing the Assimilated CBER with some form of industry ombudsman, the formation of a

¹¹⁹ Response to the January 2023 consultation by the WSC. Response to the January 2023 consultation by the British Chambers of Commerce. Response to the January 2023 consultation by THE Alliance. Response to the January 2023 consultation by the UK Chamber of Shipping.

¹²⁰ Response to the January 2023 consultation by THE Alliance. Response to the January 2023 consultation by the WSC.

¹²¹ Response to the January 2023 consultation by THE Alliance.

¹²² Response to the January 2023 consultation by the British Ports Association. Response to the January 2023 consultation by DP World.

¹²³ Response to the January 2023 consultation by the WSC.

¹²⁴ Response to the January 2023 consultation by Hutchison Ports.

‘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.¹²⁵

6. Third, some respondents were opposed to the CMA’s proposal, and considered that the Assimilated CBER should be allowed to lapse. Reasons given for not replacing the Assimilated CBER included:
- (a) The Assimilated CBER has failed to deliver benefits to customers.¹²⁶
 - (b) The Assimilated 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.¹²⁷
 - (c) A significant portion of the consortia operating on trades to or from Europe exceed the 30% market share threshold set by the Assimilated CBER, demonstrating that the compliance costs of self-assessment are manageable and that removal of the Assimilated CBER would not jeopardise the formation of consortia.¹²⁸

¹²⁵ Response to the January 2023 consultation by BIFA.

¹²⁶ Response to the January 2023 consultation by GSF.

¹²⁷ Response to the January 2023 consultation by BIFA. Response to the January 2023 consultation by GSF.

¹²⁸ Response to the January 2023 consultation by GSF.