



EUROPEAN COMMISSION DECIDES NOT TO EXTEND THE LINER CONSORTIA BLOCK EXEMPTION REGULATION

On 10 October 2023, the European Commission (the “Commission”) announced that it would not extend the Liner Consortia Block Exemption Regulation (“CBER”). Following its review of the CBER, the Commission has concluded that the CBER is no longer fit for purpose. Consequently, the Commission will let the CBER expire on 25 April 2024.¹

¹ European Commission. *Commission decides not to extend antitrust block exemption for liner shipping consortia*. Available at: [Antitrust \(europa.eu\)](https://antitrust.europa.eu)



This briefing will explain the Commission's rationale for not extending the CBER and will consider the impact of the CBER's expiry on cooperation agreements between liner shipping companies, including vessel sharing agreements ("VSAs"), which may affect trade between Member States of the European Economic Area. It will also outline the UK Competition and Markets Authority's ("CMA") position on the CBER.

What is the CBER?

Article 101(1)² of the Treaty on the Functioning of the European Union ("TFEU") prohibits anti-competitive agreements. Article 101(3)³ exempts from the prohibition agreements that contribute *"to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit"*. Article 101(3) TFEU and Council Regulation 246/2009 allow the Commission to block exempt liner consortia from the application of Article 101(1) TFEU for a maximum five-year period.

The CBER was adopted by the Commission in 2009 and its operation was extended in 2014 and 2020. The CBER⁴ allows shipping lines, under certain conditions, to enter into cooperation agreements which amongst other things do not include price fixing.⁵ The conditions are:⁶

1. The consortium must not contain hardcore restrictions, for example, hardcore restrictions on price fixing, the allocation of markets or customers, or the limitation of capacity or sales (except capacity adjustments in response to fluctuations in supply and demand).
2. The market shares of the consortium members must not exceed 30%.
3. The consortium must give members the right to withdraw from the cooperation agreement with a maximum notice period of six months. The notice period may be extended to 12 months where the consortium is highly integrated.

Why did the Commission decide not to extend the CBER?

Following a review of the CBER, the Commission has decided that it will not extend the CBER and will let it expire on 25 April 2024.⁷ The Commission launched an evaluation process in August 2022 in order to gather facts and evidence on the functioning of the CBER. The Commission requested evidence and feedback from stakeholders on the CBER and sent questionnaires to interested parties.⁸

The Commission published its Staff Working Document on 10 October 2023 which sets out its findings from the evaluation process.⁹ The Commission concluded that the CBER no longer appears to be fit for purpose because *"it does not fulfil the criteria of effectiveness, efficiency and EU added value"*.¹⁰

The Commission noted that the evidence collected from stakeholders during the evaluation process points towards *"the – at best limited – effectiveness and efficiency of the*

² [EUR-Lex - 12008E101 - EN - EUR-Lex \(europa.eu\)](#)

³ Ibid

⁴ Commission Regulation (EC) No 906/2009. Available at: [EUR-Lex - 02009R0906-20200414 - EN - EUR-Lex \(europa.eu\)](#)

⁵ European Commission. *Commission decides not to extend antitrust block exemption for liner shipping consortia*. Available at: [Antitrust \(europa.eu\)](#)

⁶ European Commission. *Questions and Answers: Consortia Block Exemption Regulation*. Available at: [Question and Answers \(europa.eu\)](#)

⁷ European Commission. *Commission decides not to extend antitrust block exemption for liner shipping consortia*. Available at: [Antitrust \(europa.eu\)](#)

⁸ We published a briefing on the launch of the Commission's review of the CBER in August 2022. Available at: [HFW | European Commission's Review Of The Liner Consortia...](#)

⁹ European Commission. *Commission Staff Working Document*. Available at: [2023_CBER_evaluation_staff_working_document_en.pdf \(europa.eu\)](#)

¹⁰ Ibid

CBER” throughout the 2020 – 2023 period.¹¹ The evaluation found that:

- The small number and profile of consortia falling within the scope of the CBER means that the CBER provided limited compliance costs savings to carriers.
- The CBER played a secondary role in the decision of carriers to enter into a consortium. Rather, carriers indicated that this decision is informed by commercial needs.
- The CBER did not enable “small carriers to cooperate among each other and offer alternative services in competition with larger carriers”.¹²

Moreover, the evaluation established that stakeholders other than carriers have a general preference for strengthened supervision of the sector rather than administrative simplification.

What is the impact of the Commission’s decision?

The Commission has emphasised that the expiry of the CBER does not mean that liner consortia will necessarily become unlawful under EU antitrust law.

Rather, carriers will need to assess the compatibility of their cooperation agreements with EU antitrust law by using the guidance provided in the Guidelines on horizontal cooperation agreements¹³ and the Specialisation Block Exemption Regulation¹⁴ or seek professional help in this regard, involving input from lawyers and/or competition economists as appropriate. The Commission Staff’s view is that the expiry of the CBER will “allow stakeholders to benefit from the Commission’s efforts of clarification put into both the new Specialisation Block Exemption Regulation and the new Guidelines on horizontal cooperation agreements”.¹⁵

The Commission will expect liner shipping companies which cooperate to have conducted a self-assessment analysing the compatibility of the arrangement with competition law and to retain this on file in case of an investigation. Failure to have a self-assessment in place could impact adversely on a company’s defence in an investigation.

The Commission has also made clear that it will not adopt alternative sector specific guidance following the expiry of the CBER.¹⁶

What are the potential contractual implications for VSAs?

A VSA is a cooperative agreement entered into between liner shipping companies to fulfil demand on specific trade lanes through the sharing of vessel space. Operational arrangements relating to the provision of liner shipping services, including the coordination or joint operation of vessel services, are enshrined in VSAs. For this reason, VSAs often include requirements for the liner shipping companies to discuss in the event of a breach, incident or change in circumstance (as opposed to strict and immediate rights of termination). For example, many of the VSAs that HFW has come across include wording “in compliance with applicable law clauses” to the effect that if any liner shipping company is found to be in violation of an applicable law, those liner shipping companies are obliged to consult in good faith and agree on corrective action. That good faith consultation may well involve the compatibility assessment described above, but in the event that agreement cannot be reached between the parties this obligation may be difficult to enforce depending on the precise wording used.

In the event an existing VSA does contravene competition rules then difficult English common

law concepts such as illegality and frustration may be used (potentially) to bring the VSA to an end or render it unenforceable. In reality, this may mean a commercial termination of the existing VSA, although careful consideration will need to be given to unwinding the service (normally vessels are phased out of VSAs over a period of time rather than leaving abruptly) without impacting customer requirements and causing losses. Alternatively, liner shipping companies may be obliged to ensure a new replacement (compliant) VSA is adopted to supersede an existing non-compliant VSA – careful wording in the new agreement may be needed to achieve this.

What is the CMA’s position on the retained CBER?

The CBER was retained in UK law following Brexit. The CMA commenced its own review of the retained CBER in August 2022. On 19 January 2023, the CMA published its proposed recommendations to the Secretary of State for consultation.¹⁷ The consultation ended on 23 February 2023 and the feedback is apparently still being analysed.¹⁸

The CMA’s proposed recommendation to the Secretary of State is to replace the retained CBER with a Liner Shipping Consortia Block Exemption Order (“CBEO”). Amongst other things the CMA found that around 70 per cent of UK port calls by liner services were covered by consortia agreements. The CBEO would be broadly similar to the retained CBER but would incorporate some minor amendments.¹⁹

The CMA’s Consultation Document states that the CMA “sees value in aligning its approach” with other jurisdictions in regard to block exemptions for consortia agreements. The CMA notes that an internationally consistent approach to the regulation of the liner shipping

¹¹ Ibid

¹² European Commission. *Questions and Answers: Consortia Block Exemption Regulation*. Available at: [Question and Answers \(europa.eu\)](#)

¹³ European Commission. *Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*. Available at: [EUR-Lex - 52023XC0721\(01\) - EN - EUR-Lex \(europa.eu\)](#)

¹⁴ European Commission. *Commission Regulation (EU) 2023/1067 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements*. Available at: [EUR-Lex - 32023R1067 - EN - EUR-Lex \(europa.eu\)](#)

¹⁵ European Commission. *Commission Staff Working Document*. Available at: [2023_CBER_evaluation_staff_working_document_en.pdf \(europa.eu\)](#)

¹⁶ European Commission. *Questions and Answers: Consortia Block Exemption Regulation*. Available at: [Question and Answers \(europa.eu\)](#)

¹⁷ For more information on the CMA’s review of the CBER, please see our previous briefing published in February 2023. Available at: [HFW | The Competition and Markets Authority’s Review of t...](#)

¹⁸ [Retained Liner Shipping Consortia Block Exemption Regulation Consultation - GOV.UK \(www.gov.uk\)](#)

¹⁹ CMA. *UK Competition Law: Liner Shipping Consortia Block Exemption Regulation – Consultation Document*. Available at: [CBER proposed recommendation consultation document \(publishing.service.gov.uk\)](#)

“The UK’s exit from the EU has given it at least theoretical regulatory independence from the EU. However, this may be an interesting test of how far it intends to diverge from the European Commission in the field of competition law...”

industry would provide legal certainty and reduce compliance costs. Additionally, the CMA indicated that UK ports should not be put at a competitive disadvantage.

Therefore, it will be interesting to see whether the CMA’s position changes following the announcement of the Commission’s decision not to renew the CBER. The UK’s exit from the EU has given it at least theoretical regulatory independence from the EU. However, this may be an interesting test of how far it intends to diverge from the European Commission in the field of competition law, although market conditions in different jurisdictions may vary and objectively require a different outcome.

Conclusion

The Commission’s decision not to renew the CBER had been anticipated as most respondents to its consultation, including the German competition authority, the Bundeskartellamt, had opposed renewal.

In advance of the expiry date of the CBER under EU competition law on 25 April 2024, liner shipping companies should give careful consideration to the implications this could have on their business and customers and, importantly, self-assess whether their cooperation agreements with other liner shipping companies are compatible with competition law. Lawyers and competition economists should be asked to provide assistance where appropriate. The Commission will expect liner shipping companies which cooperate to have conducted a self-assessment analysing the compatibility of any applicable arrangement with competition law and to retain this on file in case of an investigation. Failure to have a robust self-assessment in place could impact adversely on a company’s defence in any investigation.

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