



## CMA PUBLISHES PROVISIONAL DECISION NOT TO REPLACE THE RETAINED LINER CONSORTIA BLOCK EXEMPTION REGULATION

On 17 November 2023, the UK Competition and Markets Authority (CMA) published for consultation its provisional decision on the replacement of the retained Liner Shipping Consortia Block Exemption Regulation (Retained CBER). The CMA now proposes not to recommend to the Secretary of State for Business and Trade that the Retained CBER should be replaced with a Liner Shipping Consortia Block Exemption Order (UK CBERO) when the Retained CBER expires on 25 April 2024.<sup>1</sup>

<sup>1</sup> CMA, *UK competition law: Liner Shipping Consortia Block Exemption – Provisional decision* (17 November 2023) (CMA's Provisional Decision). Available at: [Liner\\_Shipping\\_Consortia\\_Block\\_Exemption\\_provisional\\_decision\\_PDFA.pdf](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1248442/Liner_Shipping_Consortia_Block_Exemption_provisional_decision_PDFA.pdf) ([publishing.service.gov.uk](https://publishing.service.gov.uk))

The CMA initially proposed to recommend that the Secretary of State replace the Retained CBER with a UK CBEO.<sup>2</sup> The CMA's provisional decision follows a consultation on its initial proposed recommendation and the announcement on 10 October 2023 that the European Commission (the Commission) had decided not to extend the CBER when it expires.<sup>3</sup>

### Competition law and the retained CBER

Chapter I of the Competition Act 1998 (CA98) prohibits agreements between undertakings, which may affect trade within the UK and which have as their object or effect the prevention, restriction or distortion of competition within the UK. It is modelled on Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Section 9 CA98 sets out the conditions that must be met for an agreement to benefit from exemption from the Chapter I prohibition. Firstly, the agreement must contribute to improving production or distribution, or promoting technical or economic progress (referred to as 'efficiencies'). Secondly, the agreement must allow consumers a fair share of the resulting benefit. Thirdly, the agreement must not impose on the undertakings restrictions which are not indispensable to the attainment of those objectives. Fourthly, the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.<sup>4</sup>

The CBER provides a block or automatic exemption from competition rules for certain types of agreements between liner shipping companies. The CBER was retained in UK law as the

Retained CBER following the UK's withdrawal from the European Union (EU).<sup>5</sup> The Retained CBER provides a block exemption from the Chapter I prohibition.

### The CMA's initial consultation

The CMA launched a review of the Retained CBER in August 2022. On 19 January 2023, the CMA published for consultation its proposed recommendation that the Retained CBER be replaced with a UK CBEO.<sup>6</sup> The CMA received responses from ten stakeholders, including the World Shipping Council (WSC), Asian Shipowners' Association (ASA), British Ports Association and Global Shippers Forum (GSF).<sup>7</sup> Some respondents considered that the Retained CBER should be allowed to lapse because it had failed to deliver benefits to customers. In addition, GSF noted that *"a significant portion of the consortia operating on trades to or from Europe exceed the 30% market share threshold set by the Retained CBER, demonstrating that the compliance costs of self-assessment are manageable"*.<sup>8</sup>

### The CMA's provisional decision

In light of the feedback received to the initial consultation, the CMA carried out further assessment and reconsidered its proposed recommendation. The CMA's provisional decision is that it will now not recommend to the Secretary of State to replace the Retained CBER with a UK CBEO and consequently, let the Retained CBER expire on 25 April 2024.<sup>9</sup>

In its provisional decision, the CMA stated that in order to recommend the replacement of the Retained CBER with a UK CBEO, two broad conditions should be met.<sup>10</sup> First, there must be sufficient certainty that consortia agreements are likely to meet the conditions of the exemption in Section 9

CA98 (Condition 1). Secondly, there must be sufficient benefits brought by a block exemption compared to self-assessment under Section 9 CA98 (Condition 2).

In regard to Condition 1, the CMA concluded that it *"no longer has sufficient certainty that consortia covered by the Retained CBER will produce efficiencies which outweigh their potential impact on competition"*. For example, the CMA received evidence that during the pandemic there had been large increases in the price of liner shipping services and in the profitability of liners as well as a reduction in service levels, indicating that consumers at least at that time did not receive a fair share of the benefits arising from liner consortia. The CMA also noted that by Autumn 2023 freight rates had largely returned to pre-pandemic levels, and that stakeholders representing liners had argued that prices had increased during the Covid pandemic due to external 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. However, the CMA also took into account increased concentration and vertical integration of providers of liner shipping services in recent years.

The CMA emphasized that it lacked sufficient certainty that the criteria required to justify an automatic exemption from the Chapter I prohibition are met. That did not imply that consortia will-if assessed independently on a case by case basis-be unlikely to satisfy the conditions for exemption under section 9 CA98.

In regard to Condition 2, the CMA concluded that *"creating a new UK CBEO as a sector-specific block exemption would give rise to insufficient benefits compared*

2 CMA. *UK Competition Law: Liner Shipping Consortia Block Exemption Regulation – Consultation Document* (19 January 2023). Available at: [CBER proposed recommendation consultation document \(publishing.service.gov.uk\)](#)

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

4 Competition Act 1998, Section 9(1)

5 Commission Regulation (EC) No 2006/2009 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). Available at: [EUR-Lex - 32009R0906 - EN - EUR-Lex \(europa.eu\)](#). The CBER was retained in UK law as the Retained CBER as a result of a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

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

7 CMA's Provisional Decision

8 CMA's Provisional Decision

9 CMA's Provisional Decision

10 CMA's Provisional Decision

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to a scenario where the consortia agreements that might be exempt under a UK CBEO are assessed according to the ordinary provisions of competition law”. In reaching this conclusion, the CMA considered evidence that a large proportion of liner consortia exceed the 30% market share threshold and thus are required to carry out self-assessment of their agreements.

If the CMA’s provisional decision becomes final, “liners participating in the proportion of consortia agreements currently benefiting from exemption would need to consider the application of an alternative block exemption (such as the specialisation block exemption) or ... they would need to self-assess compliance of the agreement with the Chapter I prohibition”. The CMA notes that “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 ...”<sup>11</sup>

## Impact of the Commission’s decision not to renew the CBER

In contrast to the CMA’s initial proposed recommendation, the Commission announced on 10 October 2023 that the CBER is no longer fit for purpose and it would not renew the CBER when it expires on 25 April 2024.<sup>12</sup> We published a briefing which reviewed the Commission’s decision not to extend the CBER.<sup>13</sup>

The CMA’s reversal of its initial recommendation is somewhat surprising given recent pressure on the UK from global shipowners to diverge from the EU’s position on the CBER. The Financial Times reported that the WSC and ASA wrote a joint letter to the CMA which “urged the UK to act as a “sovereign nation” after Brexit and retain the [CBER]”.<sup>14</sup> The trade press also reported that

other jurisdictions may be likely to follow the UK’s decision on the liner block exemption given the “outsized role London has in maritime commercial agreements”.<sup>15</sup>

In its initial consultation document, the CMA recognised that “UK ports are commonly stops on wider European services, meaning that businesses serving the UK must also comply with European legal frameworks”. The CMA also stated that “since other jurisdictions in the region continue to offer block exemptions for consortia agreements, the CMA sees value in aligning its approach to ensure the needs of UK businesses and consumers are served”.<sup>16</sup> If the CMA’s provisional decision is finalised, the UK’s and the EU’s position on the CBER would be aligned. However, the UK position would conflict with other jurisdictions, such as Singapore and Hong Kong. Singapore and Hong Kong renewed their relevant block

<sup>11</sup> CMA’s Provisional Decision

<sup>12</sup> European Commission. *Commission Staff Working Document*. Available at: [2023\\_CBER\\_evaluation\\_staff\\_working\\_document\\_en.pdf](https://ec.europa.eu/competition/antitrust/actions_penalties/swd20230001_en.pdf) (europa.eu).

<sup>13</sup> <https://www.hfw.com/downloads/005402-HFW-European-Commission-decides-not-to-extend-Liner-Consortia-Block-Exemption-Regulation.pdf>

<sup>14</sup> Financial Times, *Shipowners press UK to diverge from EU on antitrust rules* (6 November 2023). Available at: [Shipowners press UK to diverge from EU on antitrust rules](https://www.ft.com/content/1c1c1c1c-1c1c-1c1c-1c1c-1c1c1c1c1c1c) (ft.com)

<sup>15</sup> TradeWinds, *Wavelength: Could liner shipping offer Britain that sought-after Brexit dividend?* (9 November 2023). Available at: [Wavelength: Could liner shipping offer Britain that sought-after Brexit dividend?](https://www.tradewindsnews.com/news/2023/11/09/wavelength-could-liner-shipping-offer-britain-that-sought-after-brexit-dividend/) | TradeWinds (tradewindsnews.com)

<sup>16</sup> CMA. *UK Competition Law: Liner Shipping Consortia Block Exemption Regulation – Consultation Document* (19 January 2023). Available at: [CBER proposed recommendation consultation document](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1111111) (publishing.service.gov.uk)

exemptions for liner consortia in 2021 and 2022 respectively.<sup>17</sup>

In assessing whether the Retained CBER offered sufficient benefits compared to self-assessment, the CMA considered the interaction between a UK CBEO and the treatment of consortia under EU competition law. The CMA stated that all consortia currently serving UK ports are likely to fall within the jurisdiction of EU competition law because they also call at ports within the EU as part of the same service. The CMA contended that *“the practical impact of a UK block exemption cannot be assessed in isolation from the position in the EU”*. The CMA noted that if the UK renewed the Retained CBER as a UK CBEO, and the EU let the EU CBER expire, *“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”*. The CMA concluded that it is unlikely that liners would re-route their services to avoid calling at EU ports. Consequently, it is unlikely that a UK CBEO would materially reduce any burdens associated with competition law compliance for liners operating routes calling at both EU and UK ports.<sup>18</sup>

### Next steps

The CMA is currently consulting on its provisional decision. This consultation is open for responses by email to [cberreview@cma.gov.uk](mailto:cberreview@cma.gov.uk), until 17:00 GMT on Friday 15 December 2023. Further details on the review can be found in the consultation document.

Following the consultation, the CMA will then make a final decision on whether or not to make a recommendation to the Secretary of State to replace the Retained CBER with a UK CBEO when it expires.

Meanwhile, in advance of the expiry date of the Retained CBER under UK competition law on 25 April 2024, liner shipping companies should give careful consideration to the implications this could have on their business, in particular removal of legal certainty. They should self-assess whether their cooperation agreements with other liner shipping companies are compatible with competition law, bearing in mind the CMA's finding that around 70 per cent of the capacity of liner services reaching UK ports is provided under consortia agreements. Lawyers and competition economists should be asked to provide assistance where appropriate. The CMA 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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<sup>17</sup> See Competition and Consumer Commission of Singapore, *Competition (Block Exemption for Liner Shipping Agreements) Order*. Available at: [Competition \(Block Exemption for Liner Shipping Agreements\) Order - Singapore Statutes Online \(agc.gov.sg\)](#)

See Hong Kong Competition Commission, *Block exemption order in relation to certain vessel sharing agreements*. Available at: [Competition Commission - Block Exemption Orders Register - Block exemption order in relation to certain vessel sharing agreements, issued on 8 August 2017 \(compcomm.hk\)](#)

<sup>18</sup> CMA's Provisional Decision

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