



## EUROPEAN COMMISSION'S REVIEW OF THE LINER CONSORTIA BLOCK EXEMPTION REGULATION

The European Commission has launched a call for evidence on the Consortia Block Exemption Regulation (Regulation 906/2009).

The European Commission (the **Commission**) has launched a call for evidence<sup>1</sup>, and has issued a press release<sup>2</sup>, in which it has asked for feedback on the Consortia Block Exemption Regulation (**CBER**)<sup>3</sup> which provides an exemption from EU competition rules for liner shipping consortia which meet certain conditions, including a market share limit of 30 per cent. This briefing outlines the background to the CBER, provides an overview of the call for evidence and advises businesses on how they can provide feedback in response to the call for evidence.

<sup>1</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation_en)

<sup>2</sup> Antitrust (europa.eu)

<sup>3</sup> EUR-Lex - 32009R0906 - EN - EUR-Lex (europa.eu)

## Background

Article 101(1)<sup>4</sup> of the Treaty on the Functioning of the European Union (TFEU) states that “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market” will be prohibited. There is an exemption, however, contained within Article 101(3)<sup>5</sup> of the TFEU which states that the prohibition will be inapplicable where the agreement in question “contributes 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”.

Pursuant to Article 101(3) TFEU and Council Regulation 246/2009<sup>6</sup>, the Commission can exempt liner consortia from the prohibition in Article 101(1) TFEU for a maximum five-year period, although this can be extended. In 2009, the Commission adopted the CBER, which sets out the conditions for the exemption, and which was extended in 2014 and 2020. Recital 2 of the CBER states that “the justifications for a block exemption for liner consortia are still valid”. The Commission’s view, as outlined in Recital 5, was that consortia “generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilisation of port facilities. They also help to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity”.

The position, as outlined in Article 5 of the CBER, is that a consortium can qualify for the exemption where the combined market share of the consortium members in the relevant

market upon which the consortium operates does not exceed 30 per cent. Members of the consortium must set their own prices independently.

The CBER provides a degree of legal certainty to liner shipping companies that their co-operation agreements do not infringe EU competition law.

Relevant types of co-operation agreements between liner shipping companies that benefit from the CBER include:

- The joint operation of liner shipping services, including the coordination of timetables and ports of call, slot exchanges, pooling of vessels and certain infrastructure, and the use of joint operations offices.
- The ability to make capacity adjustments in response to fluctuations in supply and demand.
- Joint operation or use of port terminals and related services such as stevedoring services.

However, the CBER does not exempt co-operation agreements having as their object the following types of activities which will generally infringe EU competition law:

- Price fixing.
- Limitation of capacity and sales (other than adjustments made in response to fluctuations in supply and demand).
- Allocation of customers and markets.

The conditions that must apply for the parties to a co-operation agreement to benefit from the CBER are broadly that:

- The parties to the co-operation agreement have a combined market share of not more than 30 per cent on any market on which they operate.
- Any party to the co-operation agreement is permitted unconditionally to exit the agreement on no more than six

months’ notice after an initial lock-in period of a maximum of 24 months (these periods can be extended to 12 months and 36 months respectively for highly integrated consortia).

If the CBER does not apply to a relevant co-operation agreement, this does not mean that the agreement will automatically infringe EU competition law. But it will not automatically benefit from the safe harbour.

As the CBER is stated to apply to parties operating set routes on the basis of a regular timetable, it is of primary importance to the container shipping industry.

The prolongation in 2020<sup>7</sup> was decided because the Commission’s evaluation had shown that despite evolutions in the market (increased consolidation, concentration, technological change, increasing size of vessels) the CBER was still fit for purpose, in line with the Commission’s “Better Regulation”<sup>8</sup> approach to policy-making, and delivered on its objectives. Moreover, the consortia agreements that met the conditions set out in the CBER continued to satisfy the conditions laid down in Article 101(3) TFEU<sup>9</sup>. More specifically, the Commission had found that the CBER resulted in efficiencies for carriers that could better use vessels’ capacity and offer more connections. The exemption only applied to consortia with a market share not exceeding 30 per cent and whose members were free to price independently. In that context, those efficiencies resulted in lower prices and better quality of service for consumers. Specifically, the evaluation had shown that in recent years both costs for carriers and prices for customers per twenty-foot equivalent unit (TEU) had decreased by approximately 30 per cent and quality of service had remained stable. The extension was limited to four years, compared to the traditional five-year duration of the CBER, to be able to react more promptly in the event of any possible

<sup>4</sup> EUR-Lex - 12008E101 - EN - EUR-Lex (europa.eu)

<sup>5</sup> Ibid

<sup>6</sup> EUR-Lex - 32009R0246 - EN - EUR-Lex (europa.eu)

<sup>7</sup> Antitrust: Commission prolongs the validity of CBER (europa.eu)

<sup>8</sup> Better Regulation: why and how | European Commission (europa.eu)

<sup>9</sup> EUR-Lex - 12008E101 - EN - EUR-Lex (europa.eu)

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changes in market circumstances. The CBER is therefore due to expire on 25 April 2024 at which point the Commission will need to decide whether to retain, amend or opt not to renew the exemption for the period following 25 April 2024. Against this background, in July 2022 press reports indicate that ten trade organisations wrote a letter to the Commission calling for a review of the position under the CBER<sup>10</sup>. Freight forwarders have also argued that large shipping companies expanding into logistics risks distorting business relations and leading to discrimination<sup>11</sup>.

## European Commission Call for Evidence and Press Release

On 9 August 2022, the Commission issued a call for evidence, in which it asked for feedback on the CBER. It also sent questionnaires to interested parties including shippers, freight forwarders and carriers. The call for evidence<sup>12</sup> is designed to obtain views on and determine how the CBER has functioned since it was last extended in 2020. It allows interested parties to provide comments until 3 October 2022.

According to the Commission's press release<sup>13</sup>, the feedback provided by the call for evidence will supplement the “evidence it has collected as part

of its sectoral monitoring activities” and from “exchanges with market participants” and several competition authorities globally.

## What next?

As outlined above and in accordance with the Commission's press release<sup>14</sup>, interested parties can “submit their comments to the call for evidence and targeted questionnaires until 3 October 2022”. The press release states that the Commission will review the feedback and that it will then summarise the results of the evaluation in a Staff Working Document that is due to be published in the last quarter of 2022.

Interested parties should consider submitting evidence before the 3 October 2022 deadline either directly or via a trade association.

On 24 August 2022 the UK's Competition and Markets Authority (CMA) announced that it would conduct a review of the retained CBER (retained in UK law following the UK's exit from the EU).<sup>15</sup> The CMA intends to assess whether the retained CBER meets its intended purpose in order to make a recommendation to government on whether to replace or vary it when it expires. In carrying out its review, the CMA will take account of specific features of the UK economy serving

the interest of UK businesses and consumers. It will also consider the possible implications for the retained CBER of recent developments in liner shipping, including the impact of global supply chain difficulties. The CMA expects to consult on its proposed recommendation on the future of the retained CBER in 2023.

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<sup>10</sup> European shippers call for review of competition rules in liner shipping - Splash247

<sup>11</sup> MLex | Shipping industry mergers, expansion on EU antitrust radar in review of sector rules

<sup>12</sup> EU competition law – evaluation of the Consortia Block Exemption Regulation (europa.eu)

<sup>13</sup> Antitrust (europa.eu)

<sup>14</sup> Ibid

<sup>15</sup> Liner Shipping Consortia Block Exemption Regulation - GOV.UK (www.gov.uk)

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