Briefing paper: European Commission Evaluation of the Consortia Block Exemption Regulation

World Shipping Council, June 2023

Executive Summary

- The EU Consortia Block Exemption Regulation (CBER) is an essential regulatory tool that yields significant benefits to a variety of stakeholders, including Member States, with no downside from a competition or consumer welfare perspective.
- The CBER contributes to the connectivity and competitiveness of Member State economies, to the benefit of their exporters and consumers, whilst also making important contributions to climate goals.
- The CBER is consistent with the approach taken in the vast majority of nations that trade with the EU (several recently renewing their equivalent legal frameworks); inconsistent policies could create disruption to liner shipping services and trade.
- WSC is therefore calling on Member States and their national competition authorities (NCAs) to support the renewal of the CBER beyond its April 2024 expiry date.

Consortia and the CBER

Consortia are vessel sharing arrangements between containership carriers. The majority of containerized cargo (by value) shipped to and from the EU is shipped by consortia. Consortia enable carriers to share vessel space so that they can consolidate seaborne cargo volumes to achieve higher levels of utilisation of more efficiently sized ships than they could achieve operating alone, and to offer a wider range of services and port calls at higher frequency than they could operating alone.

Because consortia involve collaboration between competitors, carriers must ensure that these arrangements do not violate Article 101 TFEU. The CBER facilitates the creation and operation of consortia by deeming Article 101 TFEU inapplicable to consortia agreements that satisfy certain conditions, which are clearly spelled out in the CBER, including a market-share-based threshold. It thereby creates a safe harbour for such arrangements, providing sector-specific legal certainty to the carriers involved. The CBER also lays out clear rules as to the activities that are and are not covered by the safe harbour.

The Evaluation

The CBER has existed since 1995 and has been renewed (with amendments) five times since then. The Commission is currently evaluating the CBER again and weighing stakeholder feedback on whether the CBER should be extended beyond its current expiry date of 25 April 2024.

If the Commission decides not to renew the CBER, the safe harbour referenced above will fall away and carriers will face reduced legal certainty and additional compliance costs. This is because there is no alternative source of EU guidance that could provide the same level of legal certainty as the CBER. Thus, in the event of non-renewal of the CBER, it is quite possible that certain carriers might refrain from entering into new consortium agreements and/or might even withdraw from existing consortia.

Thus, the issue at the core of the Commissions' evaluation is rather simple: if consortia are worth keeping, the CBER is worth keeping. This paper explains why consortia are indeed worth keeping and the reasons why it is in the best interests of Member States, and their NCAs, to support the CBER's renewal.

Connectivity

Consortia improve connectivity by allowing carriers to offer a higher frequency of sailings to a greater number and greater variety of ports than would be possible in the absence of consortia. This benefits Member State economies in at least two important ways.

First, EU exporters have greater choice as to (i) the departure date for their cargo, (ii) the ports from which they can send their cargo, and (iii) the ports to which they can send their cargo. Second, EU importers enjoy more flexibility as regards the ports at which they can receive their cargo and enhanced frequency of shipments, directly benefitting EU consumers.

Cost savings

By consolidating the cargoes of the consortium members, consortia enable carriers to deploy and fill more appropriately sized – often larger – vessels than they could efficiently operate alone. The operation of such ships enables carriers to provide shipping services at lower costs through economies of scale that reduce per unit operating costs (*i.e.*, the huge costs associated with sailing, docking and handling are allocated over a higher number of containers).

Also, whilst the costs of purchasing or chartering a vessel increase according to the capacity of the vessel, they do not do so proportionally (*e.g.*, the fact that one vessel has twice the capacity of another does not mean that the former costs twice as much as the latter).

Thus, consortia generate cost savings for carriers, which can be passed on to consumers in the form of lower prices. In the current era of high inflation and a widespread cost-of-living crisis, Member States should neither support nor tolerate the potential removal of a regulatory tool that helps to lower costs for consumers.

Environmental benefits

Data in the International Maritime Organisation's 4th Greenhouse Gas Study shows that larger containerships can reduce CO2 emissions per TEU by two-thirds compared to smaller containerships (see figure 1 and 2 in annex). As consortia enable carriers to operate larger ships than they could viably operate alone, they are indispensable to the fight against climate change.

This efficiency of scale applies across all ship sizes; thus, although the largest vessels are the most efficient (and least polluting) on a per-cargo-unit basis, the emissions reductions available from using consortia to deploy more efficient vessels extend across all vessel sizes in the global fleet.

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

Global significance of the CBER

The global shipping industry has multiple competition law overseers, many of whom have a block exemption or equivalent for consortia agreements. This includes the United States, China, Canada, Japan, Australia, and others. At least three jurisdictions – Singapore, Hong Kong, and Israel – have recently evaluated and decided to extend their block exemption orders (BEOs), thus affirming the benefits of consortia (and their facilitation) from a policy perspective. In their analyses and press releases announcing the BEO renewals, those jurisdictions cited the importance of consortia agreements for the competitiveness and connectivity of their ports and overall economic efficiency.

Regarding the Commission's evaluation of the CBER, the stakes are high because many jurisdictions look to the Commission (both formally and informally) for leadership and best-practice guidance. Thus, if the Commission decides not to renew the CBER, this could be interpreted by other jurisdictions as a signal that consortia should no longer be regarded as efficiency-enhancing arrangements that benefit consumer welfare – despite the evidence to the contrary. Whilst non-renewal of the CBER will not render consortia unlawful as a matter of EU law, the loss of a block exemption in other jurisdictions could have more dire consequences. This would be the case in jurisdictions that do not have an equivalent to the EU notion of "self-assessment". In those jurisdictions, the absence of a block exemption could foreseeably result in carriers ceasing to participate in consortia. Given the international nature of liner shipping, and the fact that carriers must comply with multiple legal regimes, this could also negatively impact trade to and from the EU – regardless of the level of risk based on an EU competition law self-assessment.

The COVID-19 crisis

Opponents of the CBER are sceptical of its benefits in light of the increased cost of shipping, and supply chain disruption, which occurred during the COVID-19 crisis. However, there is broad consensus amongst regulators, including the European Commission and the U.S. Federal Maritime Commission, that such price increases and disruption were caused by unprecedented market forces not attributable to carriers or consortia.

Furthermore, there is now an abundance of market data which shows that freight rates declined steadily throughout 2022 and early 2023 and have normalised to pre-pandemic levels. In short liner shipping has resumed the deflationary role within the global economy that it has held for over two decades, by offering significantly discounted maritime transport services relative to the global consumer price index (see figure 3).

Conclusion

Consortia are integral to the connectivity and competitiveness of EU Member States, the welfare of their consumers, and their climate objectives. The abolition of the CBER would remove the legal certainty on which consortia depend and jeopardise these benefits. It is in the best interests of the Member States, and their NCAs, to facilitate the continued operation of consortia by supporting the renewal of the CBER.

Annex

Figure 1.

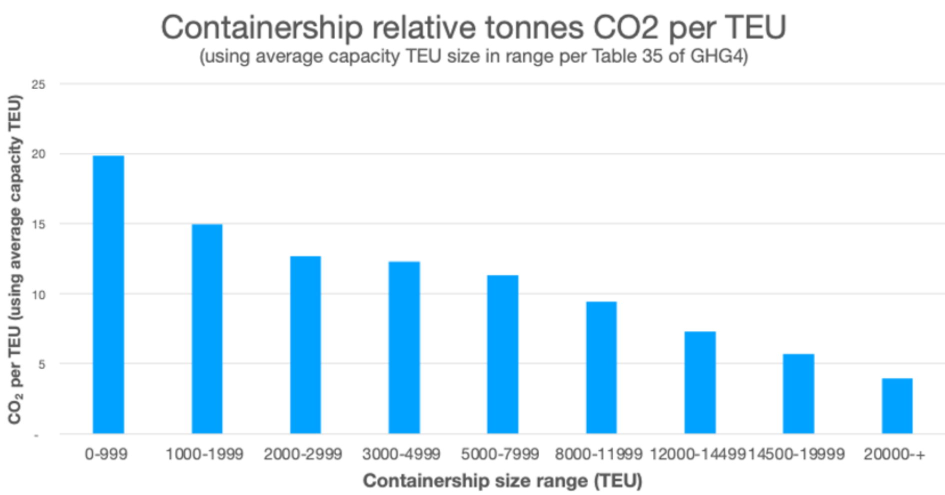
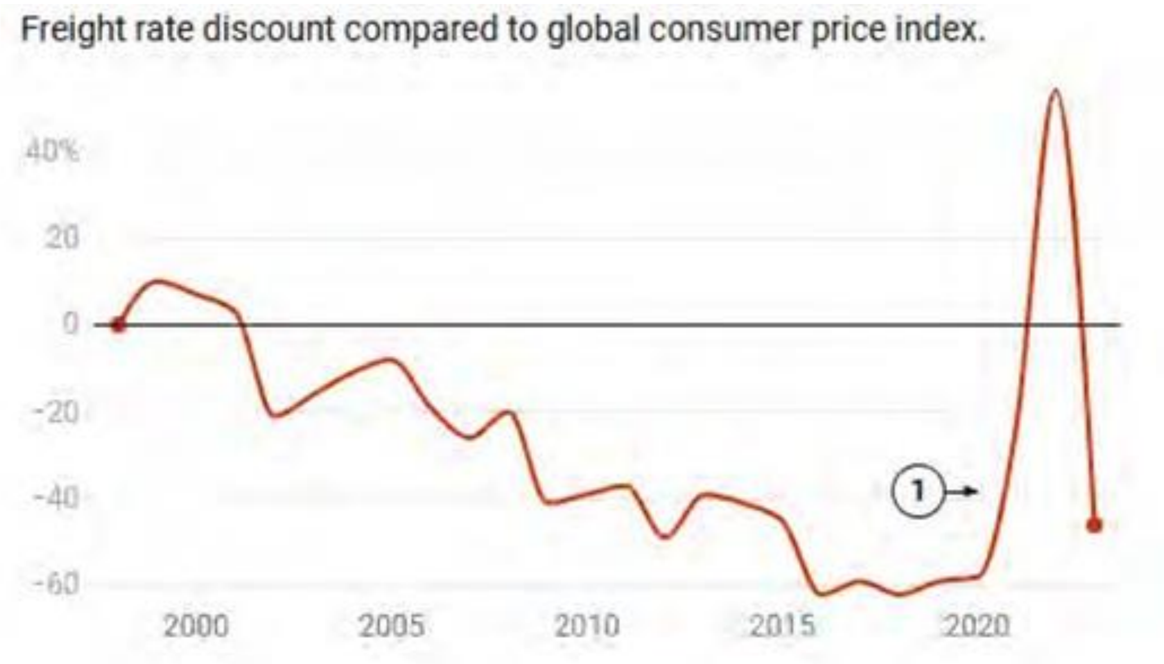


Figure 2.

Ship type	Size category	Units	EEOI ($gCO_2/t.nm$)				
			mean	median	lower quartile	upper quartile	spread scale
Container	0-999	teu	35.3	36.7	29.7	48.5	0.52
	1000-1999	teu	26.9	27.4	23.7	31.9	0.30
	2000-2999	teu	19.9	19.5	17.3	22.4	0.26
	3000-4999	teu	17.1	17.1	14.8	19.2	0.26
	5000-7999	teu	16.3	16.3	14.5	18.1	0.22
	8000-11999	teu	13.4	13.6	12.0	15.2	0.24
	12000-14499	teu	10.8	10.7	9.7	12.2	0.23
	14500-19999	teu	8.1	8.5	6.8	8.9	0.25
	20000-+	teu	7.9	8.0	6.7	9.5	0.34

Source figures 1&2: Fourth Greenhouse Gas Study 2020
https://www.imo.org/en/ourwork/Environment/Pages/Fourth-IMO-Greenhouse-Gas-Study-2020.aspx

Figure 3



1: COVID 19 Pandemic
Source: Shipping Watch - ***Carriers are blamed for a lot of things – but inflation should no longer be one of them*****. Opinion by Lars Jensen, 6 January 2023, available here.**

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