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By Electronic Mail

To: COMPETITION AND MARKETS AUTHORITY

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**Subject: RETAINED CBER CONSULTATION - RESPONSE TO CMA PROVISIONAL DECISION
OF 17 NOVEMBER 2023**

The present submission was prepared by Reed Smith LLP for and on behalf of THE Alliance in response to the CMA's provisional decision, laid down in its consultation document published on 17 November 2023, to no longer recommend to the now Secretary of State for Business and Trade to replace the retained EU Liner Shipping Consortia Block Exemption Regulation (EU CBER) when it expires on 25 April 2024 with a Liner Shipping Consortia Block Exemption Order (UK CBEO) (the CMA's provisional decision).

THE Alliance would like to thank the CMA for the opportunity given to it to make comments and provide feedback on the CMA's provisional decision before any final decision is reached.

In the event the CMA decide not to replace the EU CBER, in line with their provisional decision, THE Alliance would urge the CMA to consider providing guidance to consortia in the same way that the EU Commission issued sector-specific Maritime Competition Guidelines¹ for cabotage and international tramp services, including pool agreements in tramp shipping. These guidelines provided framework for market definition, information exchanges and horizontal cooperation between tramp shipping operators. Without a UK CBEO, there will be a need for consortia specific guidelines.

1. **THE Alliance position towards the CMA's provisional decision**

THE Alliance would like to stress that it is not aligned with the CMA's provisional decision not to replace the retained EU CBER with a UK CBEO. It therefore reiterates all the arguments made to date, including those expressed in its response to the previous CMA public consultation launched on 19 January 2023, which supported the recommendation of adopting a UK CBEO.

As an example of the practical uncertainties that will arise following the expiry and non-replacement of the EU CBER, Reed Smith are already being asked how to calculate market shares without the CBER in place. Reed Smith do not see any issue with continuing calculating market shares based on volume of the combined legs but would appreciate confirmation of this. The Specialization Block Exemption Regulation (SBER) indicates

¹ Guidelines on the application of Article 81 of the EC treaty to maritime transport services, (2008/C 245/02) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008XC0926%2801%29&qid=1701787887518>

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that Reed Smith could calculate based on value or volume but does not say how to proceed with the former, and its applicability itself raises questions (see below).

THE Alliance is not convinced by the evidence and arguments laid down in the consultation document supporting the CMA's provisional decision to remove the EU CBER, which it finds either absent or inconclusive.

By way of examples,

- It is indicated at paragraph 8.24 that the use of larger vessels is not necessarily cost-neutral for other participants in the overall supply chain. Allegedly supporting this view is the argument brought forward by a port operator, Hutchinson Ports, and reported in footnote 74 that the use of larger vessels has pushed up the unit cost of port operations to their detriment. This argument is misleading in THE Alliance's view and in any case should be backed up by very strong evidence which is missing at the moment, in particular on whether this alleged reduced efficiency at ports offsets efficiencies gained on the sea-leg, which THE Alliance has strong doubts about. Demand of port usage should not be influenced by the size of the vessel but by the total demand of cargo move which is indeed the consumer's demand. Workload to load/discharge 2 smaller size vessels and load/discharge 1 vessel twice larger than such smaller size vessels should be the same eventually. Moreover, smaller vessels would certainly call more frequently as compared to larger vessels.
- The argument that self-assessment is already routine raised at paragraphs 9.5 et seq. does not fly in THE Alliance's view because as explained in more details below self-assessments are carried out by the lines in light of the provisions in the CBER, such that the latter remains highly relevant even when the lines cannot benefit from the safe harbor.

Thus, absent a straightforward block exemption regulation in force to guide shipping lines in the assessment of their alliances, THE Alliance fears that increased complexity will arise, coupled with higher legal uncertainty.

This is well illustrated by the fact that during the Covid pandemic the Government allowed two ferry companies in the Isle of Wight to cooperate² rather than leave the parties to self-assess, which is a perfect illustration of businesses' reluctance to engage in cooperation without a clear framework.

Please note that the same applies at the EU level where Reed Smith saw a resurgence of comfort letters during the Covid pandemic, but whilst leaving it all to self-assessments may make sense in the EU given the large number of Member States, at the UK level the CMA would perhaps be well advised to consider the above before deciding to remove the useful tool that is the CBER.

In anticipation of the CMA's final decision though, THE Alliance would like to concentrate the present submission on seeking guidance from the CMA on the following points for the eventuality where the CBER would effectively not be renewed.

2. **THE Alliance request for guidance**

- (a) Applicability of the UK Specialization Agreements Block Exemption Order (UK SABEO) to liner shipping services provided by consortia

Is the CMA in agreement with the position taken by the EU Commission that absent the CBER, consortia agreements should now be assessed in light of the Specialization Block Exemption rules?

² Press release 'Government to suspend competition law to support Isle of Wight ferry routes' 27 March 2020 <https://www.gov.uk/government/news/government-to-suspend-competition-law-to-support-isle-of-wight-ferry-routes>

In its Staff Working Document on the review of the EU CBER published on 10 October 2023, at page 13, the EU Commission indicates that consortia are “a form” of joint production agreements, thus falling within the scope of the EU Specialization Block Exemption Regulation (EU SBER).

Although it is not expressly said, THE Alliance’s reading of the above is to consider that liner shipping services provided by consortia fall under the EU SBER.

However, THE Alliance note that in Staff Working Document Evaluation of 2019 (SWD/2019/0411 final), the Commission stated that “none of the other existing instruments (e.g. Horizontal Guidelines, Specialisation BER) offer, to container shipping, self-assessment guidelines and legal certainty equivalent to the Consortia BER.” And that the “expiry of the Consortia BER would place the liner shipping sector in a situation of considerable legal uncertainty”. Reed Smith believe that there is still a lack of legal certainty around the use of the SBER for consortia. Furthermore, the difference in opinion from 2019 to date, exhibits the inconsistencies of understanding surrounding the SBER and guidelines from the EU Commission throughout time, once again highlighting the need for clarity and certainty as to the applicability of the EU SBER.

When they did an evaluation of the renewal of the EU SBER, the EU Commission carried out a survey of all the relevant sectors (see below).³ The following have used the SBER: agriculture, clothing, apparel & footwear, construction, consumer electronics, household appliance, furniture, human health, professional and technical activities, food and beverage, pharmaceuticals, energy and telecommunications, but there was no example of how transport can use the EU SBER. The EU Commission Staff Working Document Evaluation of the Horizontal Block Exemption Regulations 2021 showed that Transportation was not recorded in the survey as having utilized the EU SBER under any specialization agreements, and Reed Smith are not aware of any examples of the SBER being applied in shipping cases. The lack of agreements in the transportation sector is perhaps due to the need for further clarification of the applicability of the EU SBER to the sector. The lack of agreements also contributes to the deficit of information as previous examples to review and assess applicability do not exist.

³ COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Horizontal Block Exemption Regulations, Brussels 6.5.2021, SWD (2021) 103 final <https://op.europa.eu/en/publication-detail/-/publication/075070bd-ae54-11eb-9767-01aa75ed71a1/language-en>

The evaluation support study also examined the type of agreements reported by industry:

Table 2 – Types of agreements by industry

Industry	R&D	Specialisation	Commercialisation	Information exchange	Joint Purchasing	Standardisation	Sustainability	Others, non-covered
Accommodation and food service activities	0	0	3	3	1	5	3	1
Agriculture	7	18	9	5	4	5	11	2
Arts, entertainment and recreation	0	0	2	2	3	0	0	2
Clothing, apparel & footwear	2	5	9	13	9	1	6	3
Construction	3	8	1	4	3	4	5	2
Consumer electronics	1	4	8	4	3	2	2	1
Energy	10	5	3	4	0	4	8	5
Financial and insurance activities	1	0	1	0	0	0	0	0
Food and beverage	3	2	4	5	14	3	3	2
Furniture	0	3	7	4	2	2	2	1
Household appliance	3	7	8	0	9	5	2	4
Human health	10	3	0	4	3	1	1	0
Information and communication	5	0	4	4	1	1	2	0
Pharmaceutical	11	5	1	4	4	1	3	3
Professional and technical activities	3	2	1	4	4	4	0	5
Real estate activities	0	0	0	5	3	2	0	0
Telecommunications	1	2	0	2	0	0	2	1
Transportation and storage	0	0	4	4	0	5	2	3
Other industry, please specify	7	6	3	2	1	0	0	4
Grand Total	67	70	68	73	64	45	52	39

Source: Evaluation support study, Table 7.

“Product” is defined in both the UK SABEO and the EU SBER as “a good or a service, and includes ...services and final goods or services, but does not include distribution or rental services”. However, the CMA’s Horizontal Guidance of August 2023 states that “the provision of services is outside the scope of the SABEO, except in the context of joint distribution”. Whilst the EU Commission permits ‘joint production’ in the context of services and only mentions ‘joint distribution’ in the context of hardcore restrictions and the fixing of prices and sales targets, clarification is required on the UK guidance on the term ‘joint distribution’.

The CMA have acknowledged that in the context of their approach to Green Agreements, it will not always be clear how to distinguish between climate change and general environmental benefits, and therefore reminds interested parties of the CMA’s open-door policy, whereby such parties can approach the CMA for informal guidance on this, and any other questions that parties may have in relation to this. Given that the same ambiguities and uncertainty exist in the shipping industry without the CBER, THE Alliance would hope that the CMA’s open-door policy would be applicable to this sector also.

Clarification and guidance on these points by the CMA would be very much appreciated because discrepancies in regulation between jurisdictions is very detrimental to the liner shipping sector.

(b) Small & medium businesses

Whilst not directly relevant to THE Alliance, the members of THE Alliance have vessel sharing agreements in different scopes, such as the Inter-Europe and North/South Trades.

Therefore, *what is the CMA proposing to do for small and medium businesses if the SABEO does not apply?*

(c) CMA's approach to consortia post-expiry of the retained EU CBER

Several non-opposition exemptions were granted prior to the entry into force of EU Regulation 1/2003 which introduced the requirement for the lines to carry out a self-assessment of their agreements.

As said above, when doing so, the lines were relying on the provisions of the EU CBER, e.g.

- Even though the market shares were over 30%, the lines were allowed to calculate market shares based on the EU CBER, i.e. to combine the two legs of a given trade;
- Consideration was always given to the lock-in and exit periods allowed to benefit from the block exemption;
- Most importantly, consideration was also given to the list of exempted activities set out under article 3 of the EU CBER.

There are no examples of transport self-assessment available, nor any guidance apart from the actual activities and the benefits of consortia as set out in the EU CBER.

Absent the EU CBER, the next best assistance would be confirmation from the CMA of the above being a reasonable approach to a self-assessment, alongside the requirement of effective competition on the market.

This leads back to the question: *what will replace the retained EU CBER when it expires?*

(d) Slot charter agreements

The CMA at paragraph 5.18 states that by their nature slot charter agreements are not covered by the CBER. It does not go on to say that slot charters, provided they have no restrictive clause are not caught by Article 101 or Chapter 1. It would be helpful if the CMA would make its position clear on this point.