World Shipping Council

European Commission Evaluation of the Consortia Block Exemption Regulation

Submission by the World Shipping Council, 26 January 2023

Executive Summary

The European Commission is currently evaluating the EU Consortia Block Exemption Regulation (CBER) which provides vital legal certainty for the vessel sharing arrangements entered into by shipping lines to the benefit of their customers, trade and the environment. The World Shipping Council (WSC) has made two submissions to the Commission's evaluation, calling for a renewal of the CBER under its current terms and highlighting the cost, operational and climate efficiencies generated by consortia (found here: https://www.worldshipping.org/cber, bottom of page). These papers are supported by expert economic reports and illustrate the CBER's role as a vital transport efficiency tool, facilitating efficient vessel sharing and generating widely shared public welfare benefits:

a. **Consumer/pro-competitive benefits.**[1] Consumers share in the benefits brought by consortia in the form of lower costs, higher service frequencies, better port coverage, and stronger price competition.

[1] See submission of 3 October 2022 ("WSC Paper I"), paras. 68-75 and the Annex to WSC Paper I, which is a report prepared by RBB Economics (" RBB Report"), Section 3.2.

b. **Environmental efficiency and contribution to the EU Green Deal objectives**.[2] Consortia allow carriers to maximise operational efficiency through better fleet utilisation. Consortia also allow carriers to use larger containerships which result in much lower CO2 emissions per container than smaller containerships.[3]

c. **Macroeconomic benefits**.[4] Consortia contribute to the EU's objectives of investment, job creation, and ensuring trading opportunities.

In this paper, we highlight recent market data that clearly demonstrate that increased freight rates and reduced reliability during the pandemic were the product of market forces and not attributable to carriers or consortia. Rather, it was the result of surge in goods transport demand particularly from the US, labour shortages and port and hinterland congestion which removed effective capacity from the market.

As these problems unwind, freight rates have fallen and continue to fall significantly, and liner shipping has resumed the deflationary role within the global economy that it has held for over of two decades, by offering significantly discounted maritime transport services relative to the global consumer price index. Schedule reliability also continues to improve and an imminent return to pre-pandemic levels is expected.

The latest market data is consistent with the evidence presented in WSC's submissions, demonstrating the healthy state of competition in the shipping sector that has seen rates fall as conditions return rapidly to pre-pandemic norms.

We also demonstrate how attempting to replace the CBER with other forms of guidance (the SBER, the Horizontal Guidelines, or the Article 101(3) Guidelines) will create legal uncertainty that is detrimental to the EU competition law compliance landscape. In other words, non-renewal of the CBER would be a step backwards in terms of administration rationalisation.

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[2] See WSC Paper I, paras. 49-60.

[3] Per twenty-foot equivalent units ("**TEU**"). See WSC Paper I, paras. 56-58 and RBB Report, Section 3.2, pages 11-12, in particular, Tables 4 and 5.

[4] See WSC Paper I, paras. 61-67.

How the CBER Makes Consortia Better and Improves Competition

The CBER facilitates the creation and operation of efficient consortia by greatly reducing the compliance burdens and costs required to establish this type of beneficial cooperation, where the involved carriers have a collective market share of no more than 30%.

By providing legal certainty in these limited circumstances, transport planners rather than lawyers are placed at the heart of consortia agreements, ensuring that transport efficiency is optimised, and market needs responded to dynamically.

There is no alternative source of EU guidance that could replace the sector-specific legal certainty provided by the CBER (as discussed further below).[5] Non-renewal runs the risk that carriers might refrain from entering into new consortia agreements and might even withdraw from existing consortia. Such a result would be detrimental to the international ocean transportation system that supports the EU and world economies. Therefore, if consortia are worth keeping (and that conclusion has not been challenged), the CBER is worth keeping.

Certain stakeholders oppose the renewal of the CBER on the grounds that the CBER is not delivering sufficient benefits to consumers, as evidenced by the higher freight rates and lower reliability of liner shipping services resulting directly from the COVID pandemic and its impacts on supply and demand. This assertion has been economically proven to be incorrect. WSC also understands that some stakeholders may be sceptical about the need for the CBER, given the existence of alternative sources of guidance – especially the EU Specialisation Block Exemption Regulation ("**SBER**") – and the Commission's general policy of phasing out sector-specific measures in favour of more general guidance related to Article 101 TFEU. Neither argument is well-founded as is demonstrated below.

Latest market developments and trends highlight a competitive market

Increased freight rates and reduced reliability during the pandemic were not attributable to carriers or consortia. Instead, both the European Commission[6], and the US Federal Maritime Commission[7] concluded that these developments were caused by several other

[5] See WSC Paper I, paras. 85-106 and submission of 4 November 2022 (WSC Paper II), paras. 35-38.

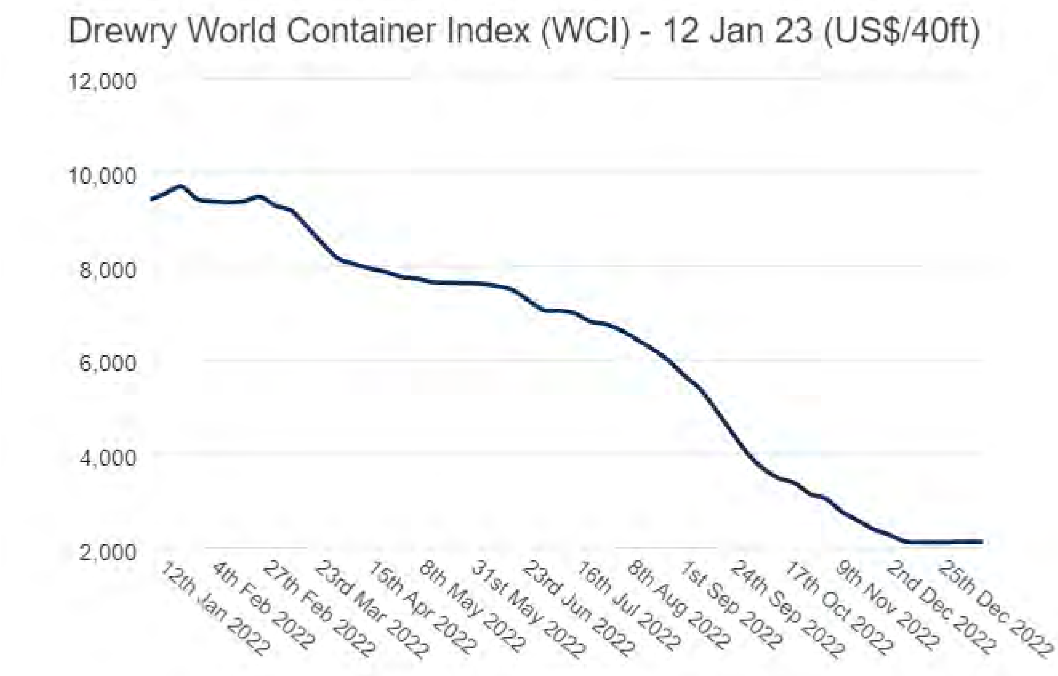
[6] Answer given by Executive Vice-President Vestager on behalf of the European Commission (23.5.2022)

[7] FMC Fact Finding Investigation, Final Report "The Effects of COVID-19 on the U.S. International Ocean Transportation Supply Chain,"

factors wholly outside the carriers' control. WSC has also provided evidence[8] that these factors were exceptional supply and demand imbalances, a surge in goods transport demand particularly from the US, labour shortages and port and hinterland congestion that removed effective (or available) capacity from the market.

These problems are now unwinding, causing reliability to increase and market conditions including freight rates to normalise rapidly. The latest market data is consistent with the evidence presented in WSC's submissions and should categorically end any debate as to whether consortia and/or the CBER caused higher freight rates or degraded performance during the pandemic. Instead, they demonstrate the healthy state of competition in the shipping sector that has seen rates fall as conditions return rapidly to pre-pandemic norms.

Freight rates continue to fall significantly, and it is predicted that they will imminently return to pre-pandemic levels or below them.



The Chief Executive of Sea-Intelligence expects that:

> "*full normalisation* [will happen] *by the end of the first quarter of 2023*" as a result of "*sharply dropping demand combined with a significant injection of capacity due to*

[9] Lloyd's List, *Latest container liftings data show extent of demand retreat*, 9 January 2023 (emphasis added), available here.

reduced bottlenecks [and the fact that] 2023 will begin to see deliveries of the sizeable orderbook, based on orders made during 2021".[9]

These comments are consistent with an analysis by Lloyd's List which notes that:

> *"[t]he normalisation of freight rates is happening faster than most expected. A return to pre-pandemic rate levels is almost complete on many trades […] [one] cause for the fall in rates was that effective capacity has risen to its highest levels since the first half of 2021 due to easing congestion and the quicker pace of newbuilding deliveries"*.[10]

In fact, in November 2022, Alphaliner was already reporting that the market was "*heading towards a 'hard landing' instead of the expected 'normalization'*", noting for instance that spot rates between Shanghai and North Europe had fallen 77.4% since their peak on 7 January 2022 and that rate erosions were continuing to accelerate.[11]

Shipping Watch echoed this outlook, noting that "*[s]pot rates on the container market are continuing to plummet*" and that "*rates for Asian-Northern European routes have now fallen by 84 percent compared to levels before the Chinese New Year in January 2022*".[12] These types of reports continued throughout December 2022 with Sea-Intelligence noting that "*spot rate levels are poised to decline substantially, to both the Mediterranean and to the US East Coast*"[13] and that "*[t]rade lanes which saw the largest spikes in freight rates in the past few years, are also the ones now seeing the most rapid declines*".[14] According to one commentator, as of January 2023, freight rates are "*in freefall*" and "*contracts [are] being re-negotiated*".[15]

Moreover, data has shown that with recent price falls liner shipping has resumed the deflationary role within the global economy that it has held for over two decades, by

[9] Lloyd's List, *Latest container liftings data show extent of demand retreat*, 9 January 2023 (emphasis added), available here.

[10] Lloyd's List, *Container spot rates close in on 2019 levels*, 21 November 2022 (emphasis added), available here.

[11] Alphaliner Weekly Newsletter, 2022-45 (02.11.2022 to 08.11.2022).

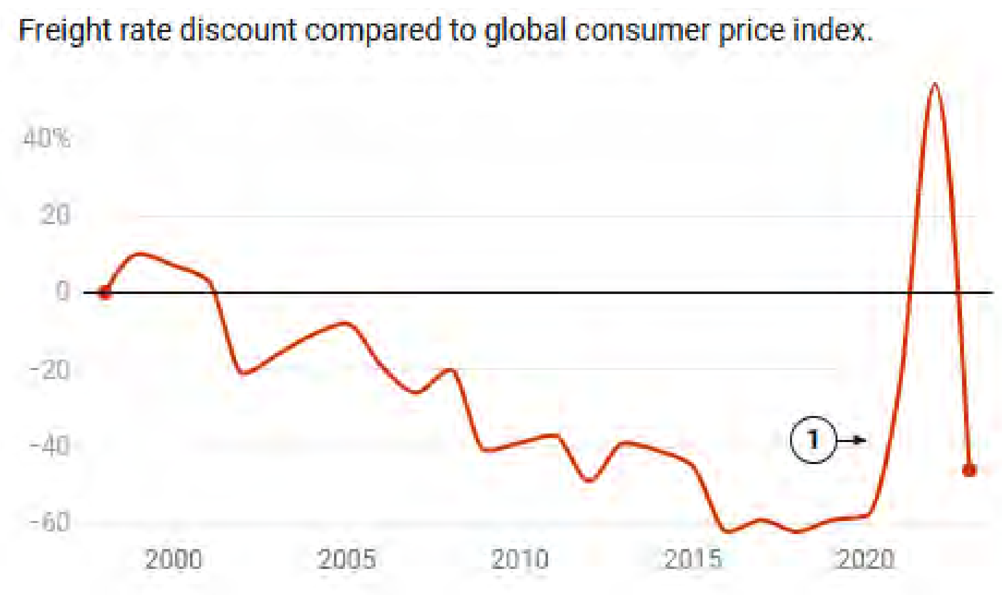
[12] Shipping Watch, *Shipping analyst: Container market is experiencing a "hard landing"*, 25 November 2022, available here.

[13] Sea-Intelligence Sunday Spotlight, December 4, 2022 – Issue 593, *Asia to Med and USEC rates to decline*, page 18 (emphasis added).

[14] Sea-Intelligence Sunday Spotlight, December 18, 2022 – Issue 595, *Regional price normalisation*, page 13.

[15] 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.

offering significantly discounted maritime transport services relative to the global consumer price index. [16]



1. COVID 19 Pandemic

Schedule reliability also continues to improve and, similar to the outlook for rates, an imminent return to pre-pandemic levels is predicted.

In late November 2022, Lloyd's List reported that:

> *"both global schedule reliability and average delay for late vessel arrivals improved in the third quarter [of 2022]"* and that *"[i]n terms of the global carriers, all of them recorded a quarterly and annual improvement in schedule reliability, with nine carriers recording double-digit annual improvements"*. [17]

This positive trend continued in December 2022 as evidenced by two reports published by Sea-Intelligence. The first noted that:

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[16] 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.

[17] Lloyd's List, *Between the lines: Stemming the decline*, 25 November 2022, available here.

"Continuing reliability improvements resulted in further release of capacity, as congestion eased from a global perspective. The pace of improvement indicate reversal to normal in 2023-Q1".[18]

The second report by Sea-Intelligence, published shortly thereafter, provided another in-depth analysis of schedule reliability, which concluded that:

"On a global level, both schedule reliability and average delays are trending upwards, now in line with 2020-1H, and moving fast towards the 2019pre-pandemic level. The same is true for the top-14 global carriers as well as the major East/West trades. […] [Also,] looking across 184 global ports […] 82% have a positive schedule reliability trend, which is an indication of alleviating global port congestion".[19]

These reports concerning rates and reliability provide a wealth of information and data confirming beyond any credible doubt the absence of a link between the market conditions witnessed during the pandemic and consortia/the CBER. (**Please see annex 1 for a full set of articles attesting to these trends**). They also attest to the healthy state of competition in the sector that has permitted rates to return to pre-pandemic levels rapidly in response to changing supply and demand. WSC respectfully urges the Commission to take this evidence into account when preparing its Staff Working Document / evaluation report on the CBER. WSC remains at the Commission's disposal should it require any further information in this regard.

No alternative source of EU guidance to the CBER

The CBER remains an essential compliance tool for carriers and no other source of EU guidance, related to Article 101 TFEU, provides a viable alternative to the legal certainty it provides.[20]

The draft revised Specialisation Block Exemption Regulation (the "New SBER") will not provide carriers with an equivalent degree of guidance, protection or legal certainty as the CBER for the following reasons:

[18] Sea-Intelligence Sunday Spotlight, December 4, 2022 – Issue 593, *Congestion is 60% resolved*, page 3 (emphasis added).

[19] Sea-Intelligence Sunday Spotlight, December 11, 2022 – Issue 594, *Schedule reliability looking more positive*, page 12 (emphasis added).

[20] See WSC Paper I, paras. 76-106; WSC Paper II, paras. 35-38.

1. It is unclear whether carriers can rely on the New SBER at all in relation to consortia because consortia involve the provision of a 'joint service', and the New SBER states that: "***The provision of services falls outside the scope of this Regulation*** *[…]*".[21]

2. The CBER provides legal certainty and guidance by defining the forms of cooperation between liner shipping companies that benefit from the block exemption and itemising the range of cooperative activities, the ancillary restrictions, and the maximum notice periods which are compatible with Article 101(3) TFEU. **No similar guidance or certainty is provided in the New SBER.[22]**

3. The market share threshold in the New SBER is 20% rather than the 30% threshold in the CBER. This **lower threshold would reduce the number of consortia that could benefit** from the block exemption, making it less relevant than the CBER and increasing the number of consortia that would require self-assessment.[23]

WSC notes that the Commission has extended the period of validity of the current SBER to 30 June 2023 "*to fully consider feedback received in response to the public consultation*" and "*to allow time to complete the ongoing revision process*".[24] In light of this "*ongoing revision process*", it is impossible for WSC to conclude that the New SBER, however it may be adopted in final form, will serve as an adequate alternative to the CBER.

To summarise WSC's position: the CBER provides sector-specific guidance which is considered essential by carriers that rely on it as part of their EU competition law compliance. Attempting to replace the CBER with other forms of guidance (be it the SBER, the Horizontal Guidelines,[25] or the Article 101(3) Guidelines)[26] will create legal uncertainty that is detrimental to the EU competition law compliance landscape. In other words, non-renewal of the CBER would not be a step forward in terms of administration rationalisation; it would actually be a damaging step backwards.

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[21] For further detail, please refer to WSC Paper I, paras. 99-100.
[22] See WSC Paper I, para. 101.
[23] See WSC Paper I, para. 102.
[24] Ref. Ares(2022)7116135 – 14/10/2022, available here (emphasis added). The SBER was due to expire on 31 December 2022, but it was extended by Commission Regulation (EU) 2022/2456 of 8 December 2022, OJ (2022) L 321/3.
[25] See WSC Paper I, paras. 87-94.
[26] See WSC Paper I, paras. 95-97.

Conclusion

For all of the above reasons, and those already submitted by WSC and in view of the vital role that consortia play in underpinning international trade and providing cost, climate and operational efficiency to global maritime supply chains, WSC calls on the Commission to extend the period of application of the CBER without amending its provisions. WSC would be happy to answer any questions that the Commission or other stakeholders might have in relation to the present submission and/or WSC's prior submissions.

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Annex 1

Selected List of Press Article detailing Recent Ocean Shipping Freight Rate Falls and Reliability Improvements (all articles attached)

Lloyds List	9 January	Latest container liftings data show extent of demand retreat
JOC	9 January	Asia-Europe Capacity Cuts Lag Market Slowdown
Sea Intelligence	8 January	EUR imports much more reliable than NAM
Shipping Watch	6 January	Carriers are blamed for a lot of things – but inflation should no longer be one of them
Financial Times	19 December	Trade Secrets Newsletter: Much better now
Sea Intelligence	18 December	Regional price normalisation
Sea Intelligence	11 December	Schedule reliability looking more positive
Sea Intelligence	11 December	Atlantic spot rates about to collapse
Sea Intelligence	4 December	Congestion is 60% resolved
Lloyds List	28 November	Box lines face hard landing as rates continue slide
Lloyds List	25 November	Between the lines: Stemming the decline (some figures on reliability improvements)
Shipping Watch	25 November	Container market is experiencing a "hard landing"
Lloyds List	22 November	Container spot rates close in on 2019 levels
Financial Times	19 November	Supply Chain Crunch is Easing
Alphaliner	15 November	Spot ocean rates in China close to pre-pandemic levels
Alphaliner	9 November	Far East-Europe trade: ’normalization’ turns into ’hard landing
Lloyds list	16 November	Shippers ignore contract commitments amid declining rates
Sea Intelligence	30 October	Review of schedule reliability in 2022-Q3 (See Attached)
Lloyds List	28 October	Box freight rate decline picks up pace again
Lloyds List	17 October	Global supply chain will be ‘more challenging’ in 2023
Lloyds List	17 October	Liner shipping carriers enter another price war

Lloyds List	14 October	Spot rates resume slide after Golden Week break
Lloyds List	13 October	Capacity reductions fail to stop container rate rout
Lloyds List	12 October	Shipping rates yet to find floor as container throughput in China dips
Lloyds List	26 September	Transatlantic freight rates face pressure from capacity deployments
Lloyds List	23 September	No respite for falling container spot freight rates
Lloyds List	7 September	Lower box freight rates are first sign of normalisation
Lloyds List	26 August 2022	Sharp fall in container spot rates as peak season flounders
American Shipper	2 October	If supply chain crunch is finally easing, why is inflation so high?
Bloomberg	26 September 2022:	Weaker Demand for Chinese Goods Spells End of Shipping Boom
Alphaliner	12 October 2022	Port congestion ties up ship capacity, but not enough to stop Asia-Europe rate drop
Alphaliner	14 September	China - USWC no longer the most lucrative trade for spot cargo
Sea-Intelligence	16 October	Transpac rate drop worse than 2015 price war
Sea-Intelligence	25 September	Imminent downwards pressure on TATL rates 83% of cargo is past the rate peak