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EVALUATION

of Commission Regulation (EC) N° 906/2009 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)

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Glossary

<i>Term or acronym</i>	<i>Meaning or definition</i>
CBER	Consortia Block Exemption Regulation
Commission	European Commission
Council	European Council
EEA	European Economic Area (27 EU Member States and Iceland, Liechtenstein and Norway, the three EEA EFTA States)
EFTA	European Free Trade Association
EU	European Union
SME	Small and medium-sized enterprise
SWD	Staff Working Document
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

Liner shipping is the provision of regular, scheduled, maritime freight transport, mainly by container, between ports on a particular route, generally known as a trade. The dramatic supply chain crisis that followed the COVID-19 outbreak has highlighted the leading role played by the sector in trade and globalisation. In 2020, about 70% of the value of international trade was carried by maritime transport, of which about two-thirds was carried by containers.¹

In the 1980s, the Commission undertook to assess the implications for EU competition policies of the organisational changes undergone by world shipping.² Those changes consisted notably in the development of containerisation,³ which prompted individual shipping lines (“carriers”) to use larger ships to minimise costs, increased the capital investment needed to establish a regular service and reduced the ability to transfer capacity from one trade to another, thus putting pressure on certain carriers to cooperate with each other. A common form of cooperation between carriers was joint service agreements, also referred to as consortia.

The Commission found that it was desirable that consortia benefit, as far as possible, from a group exemption from the EU antitrust rules prohibiting agreements that restrict competition. While consortia might reduce or eliminate competition between their members with regard to e.g. the provision and use of capacity and determination of timings and sailings, they also offered important advantages to the users of their services and contributed to the competitiveness of the EU shipping industry. As a consequence, the Commission proposed a regulation setting out the conditions under which consortia are exempted from EU antitrust rules, which was adopted in 1995⁴ and has, in essence, remained effective since then.

¹ Port Economics, Management and Policy, Value of Containerized Trade 2020, based on UNCTAD data.

² Communication by the Commission of 18 June 1990 – Report on the possibility of a group exemption for consortia agreements in liner shipping – Proposal for a Council Regulation (EEC) on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between shipping companies, COM(90) 260 final.

³ Containerisation is a logistics method in which a large amount of material (such as merchandise) is packaged into large standardised containers.

⁴ Commission Regulation (EC) No 870/95 of 20 April 1995 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council regulation (EEC) No 479/92, OJ L 89, 21.04.1995, p. 7.

The conditional exemption currently applicable to consortia is provided for in Commission Regulation (EC) No 906/2009⁵ (the “Consortia Block Exemption Regulation” or “CBER”). The CBER is due to expire on 25 April 2024. In line with the “evaluate first” principle under Better Regulation⁶, the CBER should be evaluated before its expiry, so that the Commission can decide whether to let it expire or extend it again, with or without modifications.

This evaluation report, in the form of a Staff Working Document (“SWD”), constitutes the final product of the evaluation process of the CBER. It reflects the findings and views of the Commission’s staff and does not necessarily reflect the formal position of the Commission itself.

1.1. Purpose of the evaluation

The purpose of the evaluation was to gather facts and evidence on the functioning of the CBER since its latest evaluation in 2019⁷ and extension in 2020,⁸ which serve as a basis for the Commission to decide whether it should be left to expire on 25 April 2024 or rather be extended again, with or without modifications.

As required by the Better Regulation Guidelines,⁹ the evaluation examines the extent to which the CBER fulfilled the five following criteria over the evaluation period: (i) it was effective in fulfilling expectations and meeting its objectives (effectiveness); (ii) it was efficient in terms of cost-effectiveness and proportionality of actual costs to benefits (efficiency); (iii) it was relevant to current and emerging needs (relevance); (iv) it was coherent internally and externally with other EU interventions or international agreements (coherence); and (v) it produced results beyond what would have been achieved by Member States acting alone (EU added value).

Accordingly, one of the main elements addressed by the evaluation of the CBER is whether, over the evaluation period, block-exempted consortia continued to bring

⁵ Commission Regulation (EC) No 906/2009 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), OJ L 256, 29.9.2009, p. 31.

⁶ See section II.3 of the European Commission 2019-2024 Working Methods; see also Better Regulation Toolbox dated 25 November 2021, Tool #45 – What is an evaluation and when it is required.

⁷ Commission Staff Working Document, Evaluation of Commission Regulation (EC) No 906/2009 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), SWD(2019) 411 final (the “2019 evaluation report”).

⁸ Commission Regulation (EU) 2020/436 of 24 March 2020 amending Regulation (EC) No 906/2009 as regards its period of application, OJ L 90, 25.3.2020, p. 1.

⁹ Commission Staff Working Document, Better Regulation Guidelines, 3.11.2021, SWD(2021) 305 final.

efficiency gains which eventually benefitted transport users (shippers and freight forwarders) through e.g. lower prices or better quality of services (greater connectivity, greater availability or greater reliability). This element, which, in line with the 2019 evaluation report, forms part of the assessment of the compliance of the CBER with the relevance criterion,¹⁰ derives from the legal basis of the CBER, i.e. Article 101(3) of the Treaty on the Functioning of the European Union (“TFEU”)¹¹ and Council Regulation No 246/2009¹² (the “Enabling Regulation”). According to the Enabling Regulation,¹³ *“Article [101](1) TFEU may in accordance with Article [101](3) thereof be declared inapplicable to categories of agreements, decisions and concerted practices that fulfil the conditions contained in Article [101](3)”*. Specifically, according to the Enabling Regulation,¹⁴ the Commission should, in the CBER, set out the requirements to be fulfilled by consortia ensuring that all the conditions of Article 101(3) TFEU are met, *“in particular that a fair share of the benefits will be passed on to shippers.”*¹⁵

While neither the evaluation criteria for the CBER nor the competitive structure of the liner shipping sector has substantially changed since the 2019 evaluation, the market circumstances during the two evaluation periods are radically different. The trend towards decreasing freight rates and greater availability of services that prevailed before

¹⁰ See 2019 evaluation report, p. 10: *“In evaluating whether the Consortia BER is still relevant it is examined whether consortia can still be considered economically efficient cooperation that also benefits consumers.”* As further explained in section 4.1.3 of the present evaluation report, this element also forms part of the assessment of the compliance of the CBER with the coherence criterion.

¹¹ Article 101(1) TFEU prohibits agreements between undertakings and concerted practices that restrict competition. However, Article 101(3) TFEU provides that this prohibition may be declared inapplicable to agreements or categories of agreements contributing to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits. Pursuant to Article 103 TFEU, the Council should lay down detailed rules for the application of Article 101(3) TFEU, taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other.

¹² Council Regulation (EC) No 246/2009 of 26 February 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), OJ L 79, 25.3.2009, p. 1. As of 1 December 2009, the Treaty of Lisbon amending the TFEU and the Treaty establishing the European Community of 13 December 2007 (“TEC”) (OJ C 306, 17.12.2007, p. 1) renumbered the articles of the TEC. Articles 81 and 83 TEC became respectively Articles 101 and 103 TFEU and remained, in substance, unchanged. According to Article 5(3) of the Treaty of Lisbon, references to Articles 81 and 83 TEC in instruments or acts of EU law are to be understood as referring to Articles 101 and 103 TFEU.

¹³ Enabling Regulation, recital (2).

¹⁴ Enabling Regulation, recital (10).

¹⁵ A consortium would meet all the conditions of Article 101(3) TFEU if: (i) the consortium contributes to improving the production or distribution of goods or to promoting technical or economic progress (efficiency gains); (ii) the consortium allows consumers a fair share of the resulting benefit (pass-on to consumers); (iii) the consortium does not impose on its members restrictions which are not indispensable to the attainment of these objectives (indispensability); and (iv) the consortium does not afford its members the possibility of eliminating competition in respect of a substantial part of the liner shipping services they jointly provide.

the COVID-19 pandemic was interrupted in 2020, with spot rates surging to reach a historical peak in early 2022 for services of a much degraded quality (see section 3 below). The normalisation of the liner shipping sector since mid-2022 should not detract from the need to draw lessons from the challenges faced by the maritime supply chain over the last three years and to re-examine the role of consortia in the productivity of liner shipping services, as well as the overall efficiency and resilience of the global logistics system.

In particular, the extreme variations in the price and quality of liner shipping services over the evaluation period call for an adjusted methodological approach to the assessment of the causal link between block-exempted consortia and the consumer benefits that they were expected to bring at the time of the adoption of the CBER (e.g. lower prices and/or better service quality).

On the one hand, in prior reviews of the CBER, the approach consisted in assuming the causal link between the existence of block-exempted consortia and benefits for the users of their services and assessing whether the market developments over the evaluation period raised any concern that consumers would not benefit from block-exempted consortia any more.¹⁶

As an illustration, for the 2019 evaluation, it was found that the parameters of competition had not deteriorated during the evaluation period, in particular the costs for carriers and prices for customers per TEU¹⁷ had decreased in parallel and the quality of services had remained stable. It was therefore concluded that there was no reason to depart from the longstanding view that consortia were an efficient way for providing and improving liner shipping services that also benefits customers.¹⁸ On that basis, the Commission was able to conclude with a sufficient degree of certainty, in spite of the methodological limitations in the evaluations, that block-exempted consortia still satisfied the conditions of Article 101(3) TFEU.¹⁹

¹⁶ See the 2019 evaluation report, p. 11: *“In accordance with the above, the Commission has applied the same methodology in its reviews of Consortia BER: assessing the continuous existence of efficiencies and their pass-on (absence of deterioration), rather than assessing their benchmark values. Similarly, in its last review of the Consortia BER the Commission reaffirmed that the efficiency gains and benefits, established at the adoption of that regulation, were still present at the time. The same approach and point of comparison is applied in this evaluation, where the Commission looks at what has happened or changed in the market since 2014 and assesses whether these developments raise any concern that a fair share of efficiency gains or pass-on of benefits to consumers would not materialise anymore.”*

¹⁷ Containers usually come in two standard sizes (twenty-foot and forty-foot length). The CBER uses the first one (twenty-foot equivalent units or TEUs) as a reference to establish the condition for exemption relating to the market share of a consortium.

¹⁸ See 2019 evaluation report, p. 35.

¹⁹ See Commission Regulation (EU) 2020/436 of 24 March 2020 amending Regulation (EC) No 906/2009 as regards its period of application (OJ L 90, 25.3.2020, p. 1), recital (2); Commission

Such an approach cannot be followed for the present evaluation due to the price hikes and service disruptions faced by transport users during the evaluation period. Regardless of their temporary nature, and without prejudice to the exceptional combination of factors to which they may be attributed, they remove the factual grounds on the basis of which, in prior reviews of the CBER, the consumer welfare-enhancing effects of consortia had been assumed and confirmed.

On the other hand, the volatility in the price and quality of services over the evaluation period has incited carriers to submit not only qualitative but also quantitative elements to substantiate the effects of consortia on the supply chain and consumers. The data and studies provided by carriers notably aimed to isolate the effects, over the evaluation period (2020-2023), of consortia and of the other main demand, supply and cost factors that may influence the price and quality of liner shipping services on a trade (e.g. overall demand level, bunker prices, productivity of the other operators along the supply chain, degree of competition between carriers).

The prominence given by carriers in their feedback to the substantiation of the actual consumer benefits attributable to block-exempted consortia nevertheless calls for two words of caution.

First, the results of the quantitative analyses carried out or commissioned by carriers in relation to the role of consortia (if any) in the massive freight increases in 2020-2022 should not be extrapolated to other periods, notably the period covered by the 2019 evaluation report, which was characterised by a clear trend in terms of price and service quality. In addition, despite the analytical efforts of all categories of stakeholders, it has not been possible, for the purpose of the present evaluation, to establish with a sufficient degree of certainty²⁰ the causal effects of block-exempted consortia on the price and quality of liner shipping services, due notably to methodological limitations (for example difficulties in tackling “chicken and egg” type of problems, such as whether consortia lead to an increase in the average size of vessels or whether the increase in the average size of vessels leads to consortia) or the complex interrelations between the productivity of carriers and of the operators upstream and downstream the supply chain. In other words, it has not been possible, for the purpose of this evaluation, to find a methodological approach that isolates the effects of the CBER from the general factors affecting liner shipping.

In this context, particular attention has been paid in the present evaluation to collecting evidence covering as comprehensively as possible all five evaluation criteria, not limited to the relevance of the CBER in terms of consumer benefits generated by block-

Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application (OJ L 184, 25.6.2014, p. 3), recital (1).

²⁰ See footnote 19 above.

exempted consortia, so as to be able to reach clear-cut conclusions as to the effectiveness, efficiency, coherence and EU added value of the CBER.

Second, the evaluation of the CBER neither aims at – nor is capable of – determining whether any specific consortium complies with Article 101 TFEU. This would require (i) a determination of whether it prevents, restricts or distorts competition and is thus caught by the prohibition of Article 101(1) TFEU; and, if so, (ii) a balanced assessment of both its adverse effects on competition on the relevant market (which may differ from a trade) and its pro-competitive effects. This goes beyond the purpose of the evaluation. For block-exempted consortia, the evaluation only addresses, as part of the relevance criterion, the question of whether sufficient evidence supports their pro-competitive effects, as identified by stakeholders during the consultation process. The evaluation does not attempt to quantify those pro-competitive effects, since the CBER was adopted in 2009 without providing any quantitative benchmarks for the efficiency gains or benefits to consumers.²¹ For consortia not benefitting from the CBER, as recalled in the CBER, there is no presumption that they fall within the scope of Article 101(1) TFEU or, if they do, that they do not satisfy the conditions of Article 101(3) TFEU.²² Therefore, the evaluation does not address the question of whether consortia outside of the CBER fall within the scope of prohibited agreements under Article 101 TFEU.

1.2. Scope of the evaluation

The substantive scope of the evaluation is the CBER, which applies to consortia only in so far as they provide international liner shipping services from or to one or more EU ports.²³ Trades not involving an EU port (e.g. transpacific trades) are not covered by the CBER. Therefore, they are taken into account in the evaluation only to the extent that the liner shipping services provided on those trades had an impact on the services provided on trades to or from the EU or shed some light on the systemic, overall functioning of the sector.

The CBER is the only remaining block exemption from EU antitrust rules in the maritime sector. The Liner Conference Block Exemption Regulation,²⁴ which exempted agreements between liner shipping companies on prices and other conditions of carriage on routes to and from the EU, was repealed with effect from 18 October 2008.²⁵ The

²¹ See 2019 evaluation report, p. 10.

²² See CBER, recital (4).

²³ See CBER, Article 1.

²⁴ Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, OJ L 378, 31.12.1986, p. 4.

²⁵ Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services, OJ L 269, 28.9.2006, p. 1.

Antitrust Maritime Guidelines²⁶ issued by the Commission in 2008 to, notably, accompany carriers following the end of the conference system, were left to expire in 2013.

The temporal scope of the evaluation is the 2020-2023 period, i.e. the period between the latest extension of the CBER in 2020²⁷ and the date of the drafting of this document.

The geographic scope of the evaluation extends to all Member States.²⁸ Article 101(1) of the Treaty has direct applicability in all Member States by virtue of the case law of the Union courts.

Regulation (EC) No 1/2003²⁹ created a system of parallel competences in which the competition authorities and the courts of the Member States, alongside the Commission, have the power to apply not only Article 101(1) TFEU, but also Article 101(3) TFEU. When assessing the compatibility of consortia that may affect trade between Member States within the meaning of Article 101 TFEU,³⁰ national competition authorities and national courts are bound by the directly applicable provisions of the CBER. Thus, apart from the Commission, national competition authorities and national courts are responsible for the administrative supervision of consortia, the simplification of which is one of the two specific objectives of the CBER defined for the purposes of this evaluation (see section 4.1.2 below).

²⁶ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ C 245, 26.9.2008, p. 2.

²⁷ The 2019 evaluation report covered the 2014-2019 period, so that there is no gap between the two evaluation periods.

²⁸ The United Kingdom (UK) withdrew from the European Union as of 1 February 2020. According to Article 92 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 7), the Commission continued to be competent to apply Union law as regards the UK for administrative procedures which were initiated before the end of the transition period on 31 December 2020. In this context, the external contractor in charge of the fact-finding study in 2020-2021 has collected data on consortia active in the EU and in the UK and confirmed that the UK's withdrawal had no material impact on the number or market position of consortia active to and from the EU. In addition, since the consultation activities for this evaluation were initiated after the end of the transition period, the UK's Competition and Markets Authority was not invited to contribute as part of the European Competition Network. The UK's Competition and Markets Authority is currently reviewing the CBER that was retained in UK law following the end of the transition period.

²⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1 ("Regulation (EC) No 1/2003").

³⁰ Liner shipping services are often international in nature linking EU ports with third countries and/or involving exports and imports between two or more Member States. In most cases, they are thus likely to affect trade between Member States.

In view of the Commission’s obligation to informally seek advice from experts of the EEA EFTA States for the elaboration of new legislative proposals,³¹ the Commission has informed those States of the evaluation of the CBER in order to provide them with an early opportunity to share their experience in this regard.

2. WHAT WAS THE EXPECTED OUTCOME OF THE INTERVENTION?

2.1. Description of the intervention

In essence, the CBER is a competition law instrument “legalising” certain consortia.³² More specifically, the CBER sets out the conditions under which consortia are exempted from the prohibition of agreements between competitors set out in Article 101(1) TFEU.

Consortia are defined as joint service agreements between carriers designed to rationalise their operations.³³ Although consortia may be organised in many forms, they generally fall within three categories, which involve varying degrees of cooperation.³⁴ The least integrated form of consortium is a slot³⁵ exchange agreement, in which carriers exchange space on each other’s vessels operated on a given trade.³⁶ The second form of consortium is a vessel sharing agreement, in which each carrier contributes vessels to a given service on a trade and is entitled to a number of slots on all vessels contributed to the service, proportionate to its vessel contribution. The most integrated form of consortium is an alliance, in which carriers pool a pre-decided number of vessels contributed by each of them and operate these vessels jointly on a number of trades.

The Commission acknowledges in the CBER that, due to the seasonality and cyclicity of demand for liner shipping services, an essential component of consortia is the ability to adjust capacity deployed on the trade in response to changing supply and demand conditions.³⁷

³¹ Agreement on the European Economic Area, Article 99(1).

³² See Enabling Regulation, recital (6).

³³ See Enabling Regulation, recital (5).

³⁴ Stand-alone slot charter or purchase agreements, whereby a carrier buys space on vessels of another carrier, are not reciprocal and do not involve the provision of joint services. Therefore, they are not consortia within the meaning of the CBER.

³⁵ A slot is the space for a container on-board a container ship.

³⁶ A slot exchange agreement (also called “swap agreement”) whereby a carrier makes available space on vessels operated on a trade and obtains, in exchange, space on another carrier’s vessels operated on a different trade does not involve the provision of a joint service, which implies the operation of two carriers on the same trade. Therefore, it is not a consortium within the meaning of the CBER.

³⁷ CBER, Article 3(2).

The CBER contains three types of conditions for exemption. First, consortia may not contain hardcore restrictions.³⁸ These refer to price fixing, capacity or sales limitations (except capacity adjustments in response to fluctuations in supply and demand) and the allocation of markets or customers. Second, the exemption applies to consortia with combined market shares not exceeding 30% on the relevant market on which they operate.³⁹ Third, consortia must give members the right to withdraw with a maximum period of notice of 6 months (12 months in case of a highly integrated consortium).⁴⁰

Those conditions are meant to ensure that, although consortia allow carriers to coordinate, and therefore remove differentiation, on certain service parameters (e.g. ports of call, frequency, transit time, historical schedule reliability), block-exempted consortia are unlikely to give rise to a restriction of competition or if they do, their positive effects are likely to outweigh their restrictive effects.

2.2. Description of the objectives of the intervention

The CBER aims at contributing to the improvement of the competitiveness of the EU liner shipping industry and the development of EU trade.⁴¹ The overall aim of the CBER pertains to Sustainable Development Goal 9 (“Build resilient infrastructure, promote inclusive and sustainable industrialization, and foster innovation”), Target 9.1 (“Develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all”).

General objective of the CBER

The general objective of the CBER is to protect effective competition in the liner shipping sector for the benefit of EU transport users, by promoting ways of cooperation between carriers which are economically desirable and without adverse effects from the point of view of competition.⁴² In other terms, the general objective of the CBER is to facilitate the creation and operation of consortia, to the extent that they do not pose risks to effective competition.⁴³

³⁸ CBER, Article 4.

³⁹ CBER, Article 5.

⁴⁰ CBER, Article 6.

⁴¹ See Enabling Regulation, recital (6).

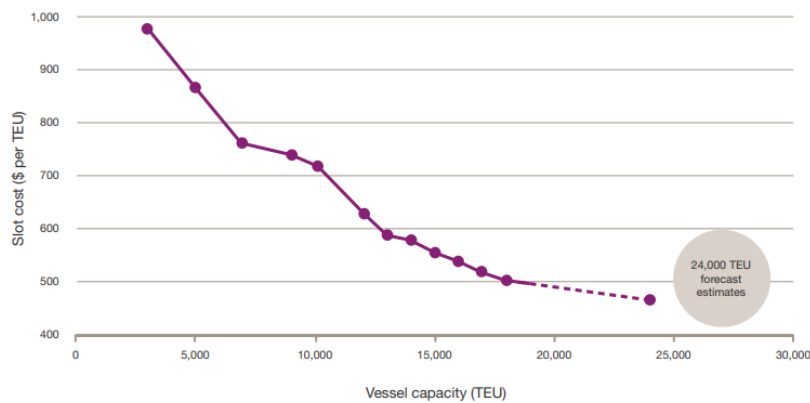
⁴² See Enabling Regulation, recital (8). The CBER shares the same general objective as the other interventions on the application of Article 101 TFEU to cooperation between undertakings operating at the same level of supply chain, including actual or potential competitors (“horizontal agreements”), in particular Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43 (the “Specialisation Block Exemption Regulation”).

⁴³ See 2019 evaluation report, p. 9.

This general objective draws from findings in 2009 about both: (i) the efficiency gains and consumer benefits brought by consortia between small and medium-sized carriers (e.g. improved frequency of sailings and port coverage, better quality and personalised services); and (ii) the role of these consortia in preventing the creation of oligopolistic market structures.⁴⁴

Regarding point (i), at the date of the adoption of the CBER (2009) and of its renewals (2014 and 2020), consortia were found to generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of their members and through the economies of scale they allow in the operation of vessels and utilisation of port facilities. The graph below (Figure 1) illustrates the economies of scale (lower cost per slot available) that were expected to be achieved through the use of larger vessels.⁴⁵

Figure 1: Ship System Cost (USD per TEU) Asia-North Europe service (round trip)



Source: Drewry, *Consolidation in the liner industry, White Paper, March 2016*

Consortia were also found to have promoted technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity. In addition, users were found to benefit from the improvement in productivity brought by consortia, in the form of an improvement in the frequency of sailings and port calls, or an improvement in scheduling as well as better quality and

⁴⁴ Those findings echo those on the basis of which the Specialisation Block Exemption Regulation was adopted. It was considered that specialisation agreements (including joint production agreements) generally contribute to improving the production process and that they are particularly suited to strengthen the competitive position of small- and medium-sized firms (see Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021) 103 final, p. 9).

⁴⁵ It is acknowledged that there is no consensus on the achievement of economies of scale for the largest vessels (see e.g. feedback from Ulrich Malchow in response to the call for evidence, indicating that, above a certain size of ships, fuel use, and thus emissions, and total cost per TEU increase again). This will be discussed as part of the assessment of the relevance criterion. Nevertheless, such lack of consensus does neither call into question the initial purpose of the CBER nor the achievement of significant economies of scale for most vessel categories.

personalised services, provided that consortia were subject to sufficient external competition.⁴⁶

The description above of the pro-competitive effects of consortia corresponds to the more general description of the favourable economic effects of joint production or specialisation agreements (of which consortia are a form) in the latest evaluation report of the Specialisation Block Exemption Regulation, i.e. the achievement of economies of scale or, in a wider sense, in rationalisation measures which enable firms to cut costs by concentrating operations. Such measures should lead, in conditions of effective competition, to lower prices and thus benefit the consumer.⁴⁷

Regarding point (ii), at the date of the adoption of the CBER (2009), the liner shipping sector was still considered as relatively fragmented with low levels of concentration, not only on a global scale, but also on a trade-by-trade basis. As examples, in 2008, on each of the four large East-West trades, i.e. from North Europe or Mediterranean to the Far East or North America, more than 20 carriers offered services, out of which at least five were operated individually.⁴⁸

However, only a limited number of individual carriers had the financial resources to bear the upfront investment for the acquisition of larger, more efficient vessels and had the route coverage to maintain a sufficiently high utilisation rate.⁴⁹ Consortia between small or medium-sized carriers were seen as a way for them to maintain their ability to compete with larger carriers, in particular the top-three carriers (Maersk, MSC, CMA CGM) which had engaged in a race for scale to win cost leadership. Consortia were notably considered indispensable for smaller carriers to bridge the capacity and frequency gap with Maersk, MSC and CMA CGM on the Far East-Europe trades.⁵⁰

Furthermore, it was recognised that demand for liner shipping services was also seasonal and cyclical and, notably due to the structural trade imbalance,⁵¹ prone to overcapacity. In

⁴⁶ CBER, recitals 5 to 7.

⁴⁷ Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021) 103 final, p. 9.

⁴⁸ Commission services document, Technical paper on the revision of Commission Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), as last amended by Commission Regulation (EC) 611/2005 of 20 April 2005 (the “2008 technical paper”), points 33 and 34.

⁴⁹ See COM(90) 260 final, p. 2.

⁵⁰ In 2009, none of those three carriers were members of integrated consortia (alliances). The latter (New World, Grand, CKHY) were rather used by small and medium-sized carriers.

⁵¹ For example, China’s position in global manufacturing means that exports of containerised cargo from China largely exceed imports, so that the demand for liner shipping services from China to Europe largely exceeds the demand for services from Europe to China. The capacity deployed on a round trip

this context, small and medium-sized carriers without strong financial resources were considered as being in a particularly vulnerable situation if they were operating on a stand-alone basis.⁵²

The specific added value of consortia for smaller carriers has been consistently used as a justification in connection with subsequent reviews of the CBER.⁵³

Specific objectives

The CBER has two specific objectives. First, it aims to provide legal certainty to carriers, in particular small and medium-sized ones, as to the forms of cooperation that can be considered as compliant with Article 101 TFEU.⁵⁴ Second, it aims to simplify administrative supervision by providing a common framework for the Commission, national competition authorities and national courts for assessing cooperation between carriers under Article 101 TFEU.⁵⁵

These specific objectives are better understood in the context of the changes in the general and sectorial legal framework for applying Article 101 TFEU introduced by Regulation (EC) No 1/2003.

Regulation (EC) No 1/2003 abolished the system of notification of cooperation agreements to the Commission which had prevailed before its entry into force. Companies therefore can no longer notify their agreements to the Commission in order to exclude the existence of an infringement and, notably, benefit from immunity from fines. They have to self-assess the compliance of their agreements with Article 101 TFEU. Self-assessment may, in certain circumstances, create a significant burden, especially for SMEs, which may lack the necessary resources or legal expertise. Regulation (EC) No

is set by reference to the dominant leg of the trade (i.e. from Far East to North Europe or to the Mediterranean), which is the main contributor of revenues on the trade.

⁵² See COM(90) 260 final, p. 2.

⁵³ See e.g. Commission Vestager, EMLO Conference, 5 October 2015: “*Consortia are a logical response to the difficulties that beset the industry and we know that they can create efficiencies. Both small and large carriers see benefits; for smaller carriers, consortia are often the only way to offer a regular service.*”

⁵⁴ See 2019 evaluation report, p. 9: “*The Consortia BER achieves this objective by providing consortia with clarity and legal certainty with respect to their compliance with EU competition rules.*” The reference to the specific need for legal certainty for smaller carriers is to be found in the section assessing the effectiveness and efficiency of the CBER (see e.g. “[*Carriers and their associations*] argue that in [*the CBER*] absence legal uncertainty and increased legal fees (due to the need to conduct complex self-assessment) will have a chilling effect on consortia, mostly on the smaller ones”, p. 18 on effectiveness, or “*The respondent carriers argue that the increased assessment costs may discourage the small carriers from entering into consortia agreements*”, p. 19 on efficiency).

⁵⁵ This specific objective was not referred to in the 2019 evaluation report. However it directly derives from Article 103 TFEU, which sets out the need to ensure effective supervision where laying detailed rules for the application of Article 101(3) TFEU (see footnote 11 above).

1/2003 also decentralised the application of Article 101(3) TFEU by empowering national competition authorities and national courts, alongside the Commission, to apply Article 101(3) TFEU, which in the past was a prerogative of the Commission only. This decentralised enforcement system created a need to foster a consistent application of Article 101 TFEU and ensure that companies operating across the EU could benefit from a level playing field.

In addition to those changes in the general legal framework applicable to cooperation agreements, the adoption of the CBER in 2009 took place in the particular context of the repeal of the Liner Conference Block Exemption, which introduced an important change in the specific legal framework applicable to the liner shipping markets.⁵⁶ Maintaining the block exemption for consortia was considered as a means to facilitate the transition of the industry to the standard competition regime applied to all other economic sectors.⁵⁷

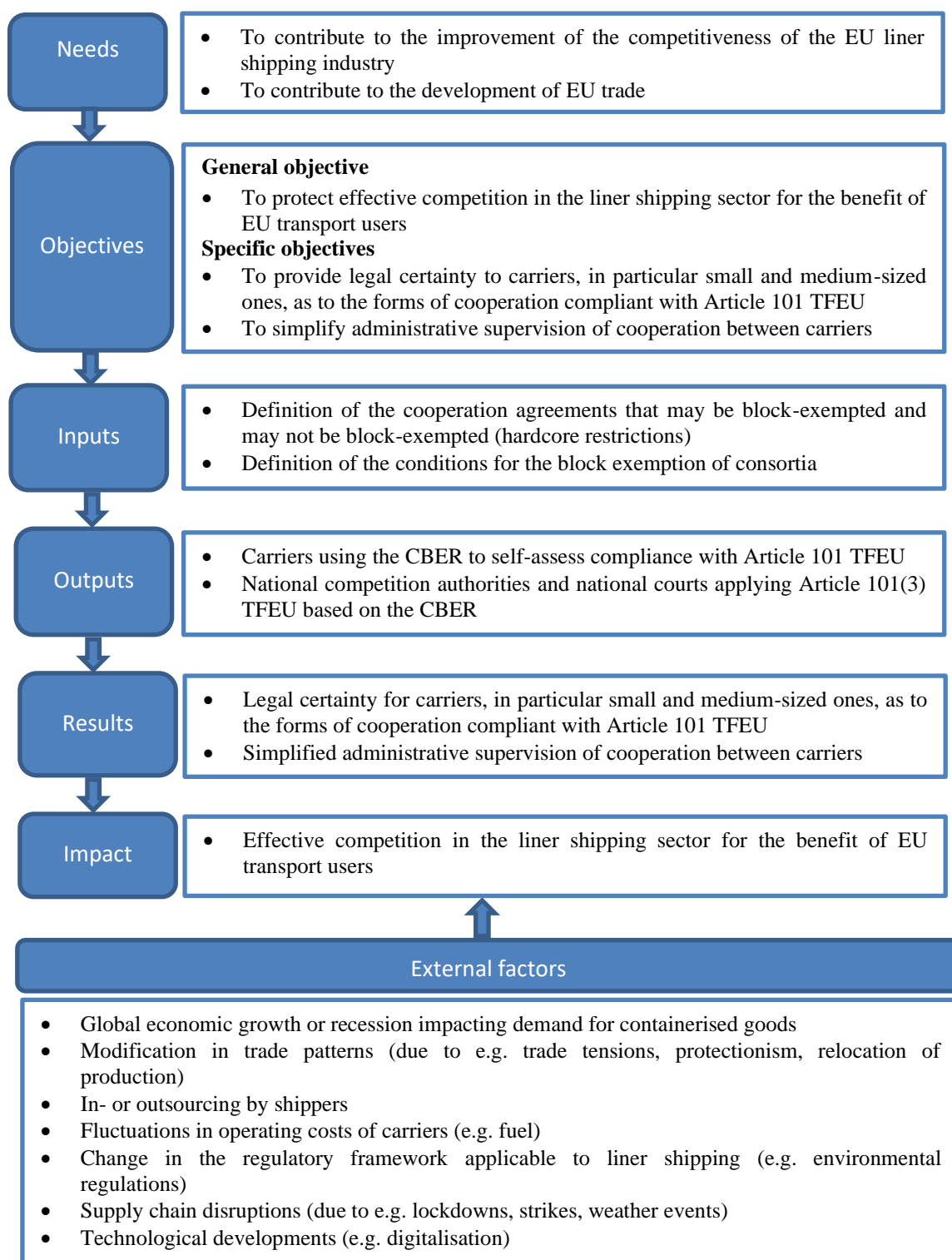
⁵⁶ Shipping companies had organised themselves since the nineteenth century in the form of liner conferences to fix prices and regulate capacity. Liner conferences were most prevalent on routes between Europe, on the one hand, and North America and the Far East, on the other hand. They were associations of shipowners operating on the same route, served by a secretariat. The Liner Conference Block Exemption Regulation allowed them to set common freight rates, to take joint decisions on the limitation of supply and to coordinate timetables. The exemption had been granted on the assumption that it was necessary to ensure the provision of reliable services. The repeal of the Liner Conference Block Exemption Regulation put an end to the possibility for liner carriers to meet in conferences, fix prices and regulate capacities on routes to and from Europe as of October 2008.

⁵⁷ See 2008 technical paper, point 15.

Logic of the CBER

The figure below (Figure 2) summarises the intervention logic of the CBER.

Figure 2: Intervention logic for the CBER



2.3. Points of comparison

The point of comparison for the assessment of the effectiveness of the CBER consists in assessing the extent to which the CBER has fulfilled its two specific objectives, i.e. (i) to provide legal certainty to carriers, in particular small and medium-sized ones, as to the forms of cooperation that can be considered as compliant with Article 101 TFEU, and (ii) to simplify administrative supervision by providing a common framework for the Commission, national competition authorities and national courts.

The point of comparison for the assessment of the efficiency of the CBER consists in assessing the savings in compliance costs and time achieved by carriers thanks to the CBER, in addition to assessing the extent to which the CBER has fulfilled its two specific objectives (same point of comparison as for the assessment of the effectiveness of the CBER).

The point of comparison for the assessment of the coherence of the CBER consists in looking at the changes during the evaluation period (2020-2023) resulting from the review of the other rules and guidance for carriers to self-assess compliance of consortia with Article 101 TFEU, in particular the Commission Horizontal Guidelines⁵⁸ and the Specialisation Block Exemption Regulation.⁵⁹ That point of comparison also includes the changes in other applicable EU and international rules, most notably the initiatives aimed at decarbonising the sector (e.g. inclusion of maritime emissions in the EU Emissions Trading System (ETS)⁶⁰ and mandatory energy efficiency requirements set by the International Maritime Organization).

The point of comparison for the assessment of the EU added value of the CBER consists in assessing whether it has achieved its operational objective of creating a legal framework supporting the competitiveness of small and medium-sized carriers active on EU trades.

⁵⁸ Version applicable until 20 July 2023: Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C11, 14.1.2011, p. 1; version applicable as from 21 July 2023: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 259, 21.7.2023, p. 1.

⁵⁹ Version applicable until 30 June 2023: Commission Regulation 1217/2010/EU of 14 December 2010 on the application of Article 101(3) TFEU to certain categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43; version applicable as from 1 July 2023: Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 143, 2.6.2023, p. 20.

⁶⁰ Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system (OJ L 130, 16.5.2023, p. 134); and Regulation (EU) 2023/957 of the European Parliament and of the Council of 10 May 2023 amending Regulation (EU) 2015/757 in order to provide for the inclusion of maritime transport activities in the EU Emissions Trading System and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types (OJ L 130, 16.5.2023, p. 105).

The points of comparison for the assessment of the relevance of the CBER are the original needs and objectives behind the CBER (i.e. to contribute to the improvement of the competitiveness of the EU liner shipping industry and the development of EU trade) and the new needs arising from, notably, the changes in the market structure as well as the economic, environmental and technological challenges faced by the sector.

The main source used for those points of comparison is the latest 2019 evaluation report.

3. HOW HAS THE SITUATION EVOLVED OVER THE EVALUATION PERIOD?

3.1. State of play in 2019

In the 2019 evaluation report, it was concluded that the CBER was relevant and delivering on its objectives, considering the state of the liner shipping industry over the 2014-2019 period. That conclusion was principally based on the following market circumstances: (i) consortia played a major role in the sector and were expected to continue to do so in the medium term due to over-capacity, low prices and low profitability; (ii) the level of concentration in the liner shipping sector had increased in recent years; although requiring close monitoring, this trend was not found to have negatively affected consumers; and (iii) both costs for carriers and prices for customers per TEU had decreased by approximately 30% and levels of services had remained stable since 2014.

3.2. Current state of play

Over the 2020-2023 evaluation period, consortia remained a prevalent feature of the sector. This is without prejudice to the increasing tendency of certain large carriers to run their networks on a stand-alone basis, by operating services outside of their alliance, and the announcement of the dissolution of the 2M alliance in 2025. In 2020, approximately 43 unique⁶¹ consortia operated in the EU (excluding intra-North Europe and intra-Mediterranean services). Those included the three global alliances,⁶² which were made of the nine largest carriers worldwide after South Korean HMM joined THE Alliance as a

⁶¹ A “unique” consortium (or “deduplicated” consortium) corresponds to a consortium as defined in Article 2(1) of the CBER (an agreement or a set of interrelated agreements relating to one or more trades). This means that an agreement or a set of interrelated agreements relating to two trades will be counted as a unique consortium. Defining one distinct consortium per relevant geographic market (“duplicating” a multi-trade consortium) would be at odds with the provisions of the CBER on the definition of a consortium (Article 2(1) of the CBER) and the scope of the exemption (Article 3 of the CBER exempts the activities of a consortium on the relevant market or markets, as referred to in paragraph 4).

⁶² Each of the three global alliances, made up of the nine largest carriers worldwide (which together represents 83% of the global capacity; the capacity dedicated to the alliances by those carriers represents 39% of the global capacity), accounts for one consortium, although it is made of a number of interrelated cooperation agreements covering a number of joint services and trades.

full member in 2020, representing more than 80% of the global capacity.⁶³ The table below gives an overview per trade⁶⁴ of the approximately 43 unique consortia active in the EU in 2020.⁶⁵ The fourth column of the table below reflects the condition related to market share set out in Article 5 of the CBER. For the sake of clarification, the reference to “*the relevant market*” in Article 5 of the CBER is interpreted as a reference to “*the relevant market or markets*” as for the other conditions for exemption set out in Article 6 of the CBER.⁶⁶ It should be recalled that, in the version of the CBER that expired on 25

⁶³ The 2019 evaluation report refers to approximately 64 consortia (including the three global alliances) operating in the EU, out of which between 9 and 29 had a market share below the 30% threshold set out in the CBER. This estimate relied on the 2018 submission by the World Shipping Council, which had used a different methodology to avoid double counting consortia providing different services, including agreements between feeder providers on an intra-regional basis while accounting for vessel-sharing agreements only (and not slot exchange agreements).

Due to the methodological issues for the calculation of the market shares described in the 2019 evaluation report (see notably p. 10), it had not been possible to more specifically estimate the number of consortia below the 30% threshold set out in the CBER, nor to establish their profile, including the types of carriers belonging to the consortia (e.g. large carriers active worldwide or smaller carriers) or the interlinkages with other consortia active on the trade.

⁶⁴ Considering that the CBER applies only to joint liner services to or from an EU port (see Article 1 of the CBER), only trades to and from the EU are taken into account. Non-EU trades are not relevant markets and the market share of a consortium on non-EU trades has no impact on whether the consortium complies with the CBER condition related to market share and may be exempted under the CBER.

⁶⁵ This table results from the market reconstruction exercise undertaken by the Commission on the basis of the fact-finding questionnaires sent in December 2021, as referred to in the Call for Evidence in the “data collection and methodology” section, as well as data provided by the external contractor MDS Transmodal. The number of consortia and their market shares should be considered as estimates, as it has not been possible to fully reconcile the data provided by the different carriers due to, notably, the differences in defining the relevant geographic markets, identifying the consortia to which they are members, listing the other members of those consortia and computing the market shares. Regarding the definition of the relevant geographic markets, for the purposes of the evaluation of the CBER, an approach per trade has been adopted. This should not be considered as prejudging the market definition that would be adopted when assessing a specific consortium under Article 101 or 102 TFEU.

⁶⁶ This interpretation is illustrated by the Commission’s approach to the (eventually abandoned) alliance between Maersk, MSC, and CMA CGM (P3 Network or “P3”) and the alliance between APL, Hapag-Lloyd, Hyundai, MOL, NYK, and OOCL (G6 Alliance or “G6”), which were considered to fall outside of the CBER for exceeding the 30% market share threshold on at least one of the relevant markets on which they operated. In June 2014, the Commission recalled: “*Members of all shipping alliances such as P3 or G6, to the extent that they do not benefit from an exemption, must themselves assess the legality of their agreements under EU competition rules*” (see press report of 4 June 2014, “No challenge to P3 in Europe”: <https://www.freightwaves.com/news/no-challenge-to-p3-in-europe>). See also written contribution from the European Union submitted for Item IV of the 59th meeting of the OECD Working Party No. 2 on Competition and Regulation on 19 June 2015, “Competition issues in liner shipping”, point 35: “*The P3 alliance could not benefit from the safe harbour of the Consortia BER because it appeared that the market share of the combined entity would exceed the 30% market share threshold. The P3 parties had, therefore, to conduct their own self-assessment of the planned cooperation to determine whether or not it was compliant under Article 101(1) TFEU and if not, whether it creates efficiencies and pass-on to customers (and the other conditions of Article 101(3) TFEU)*” (https://ec.europa.eu/competition/international/multilateral/2015_june_liner_shipping_en.pdf).

April 2010, the exemption of a consortium was conditioned upon the consortium possessing a market share of under 30% or 35% on *each* market upon which it operates.⁶⁷ The changes introduced in the CBER as adopted in 2009 were not meant to alter the requirement that the market share threshold should be respected on each of the relevant markets.⁶⁸ As explained in recital (2) of the CBER, the modifications introduced in the previously applicable CBER were necessary to remove references to the Liner Conference Block Exemption Regulation and ensuring a greater convergence with other block exemption regulations for horizontal cooperation.

Trade	Number of consortia ⁶⁹	of which no member is a top-five carrier (Maersk, MSC, CMA CGM, COSCO, Hapag-Lloyd)	Number of consortia with market share < 30% on all trades on which they are active ⁷⁰	of which no member is part of non-exempted consortia on the same trade
North Europe - Far East	3	0	0	0
Med - Far East	3	0	0	0
North Europe - North America	7	0	2	0
Med - North America	6	0	3	0
North Europe - Indian Subcontinent	4	0	1	0
Med - Indian Subcontinent	2	0	0	0

⁶⁷ See Article 6(1) of Commission Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (OJ L 100, 20.4.2000, p. 24): “*In order to qualify for the exemption provided for in Article 3, a consortium must possess on each market upon which it operates a market share of under 30 % calculated by reference to the volume of goods carried (freight tonnes or 20-foot equivalent units) when it operates within a conference, and under 35 % when it operates outside a conference.*” The same reference to “*each market*” was used in the Commission’s preliminary draft for the CBER (see Notice pursuant to Article 4 of Council Regulation (EEC) No 479/92 on the application of Article 81(3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (‘consortia’), OJ C 266, 21.10.2008, p. 1).

⁶⁸ See memo of 28 September 2009, “Antitrust: Commission adopts new Block Exemption Regulation for liner shipping consortia - frequently asked questions”: “*The 30% market share threshold provided by the new Regulation already applied to a large number of consortia in the past, as this was the market share threshold applicable to consortia which operated within the former liner conference system*” (ec.europa.eu/commission/presscorner/detail/en/MEMO_09_420).

⁶⁹ Non-duplicated. In other terms, one consortium active on two trades will be counted as two. This explains why the total number of consortia listed in this column exceeds the total of 43 unique consortia active in the EU.

⁷⁰ Non-duplicated. Out of the 14 consortia listed in this column, one is active on two trades, which explains why the number of unique consortia operating in the EU with a market share below 30% on all trades on which they are active is 13 (see section 4.1.1 below).

North Europe - Middle East	4	0	1	0
Med - Middle East	2	0	0	0
North Europe - Australasia & Oceania	2	0	1	0
Med - Australasia & Oceania	1	0	0	0
North Europe - South America West Coast	3	0	0	0
Med - South America West Coast	0	0	0	0
North Europe - South America East Coast	2	0	0	0
Med - South America East Coast	3	0	0	0
North Europe - Central America & Caribbean	3	0	0	0
Med - Central America & Caribbean	3	0	1	0
North Europe - West Africa	2	0	2	2
Med - West Africa	3	0	2	0
North Europe - South Africa	1	0	0	0
Med - South Africa	1	0	0	0
North Europe - East Africa / Indian Ocean Islands	1	0	0	0
Med - East Africa / Indian Ocean Islands	1	0	0	0
North Europe - Med	3	0	1	0

The shares of capacity deployed by consortia per trade also illustrate the prevalence of consortia over the evaluation period. They reached between 40% on the Europe-South America West Coast trade and 100% on the Far East-Europe trades in 2020, where the available capacity was almost exclusively attributable to the members of the three global alliances.⁷¹ A number of smaller carriers entered the latter trades in 2021, in order to take advantage of high freight rates. However, those new entrants added only very limited capacity to incumbent carriers (less than 3%) and are now phasing out (e.g. Allseas, China United Lines), overburdened by unsustainable charter rates and a fading demand.

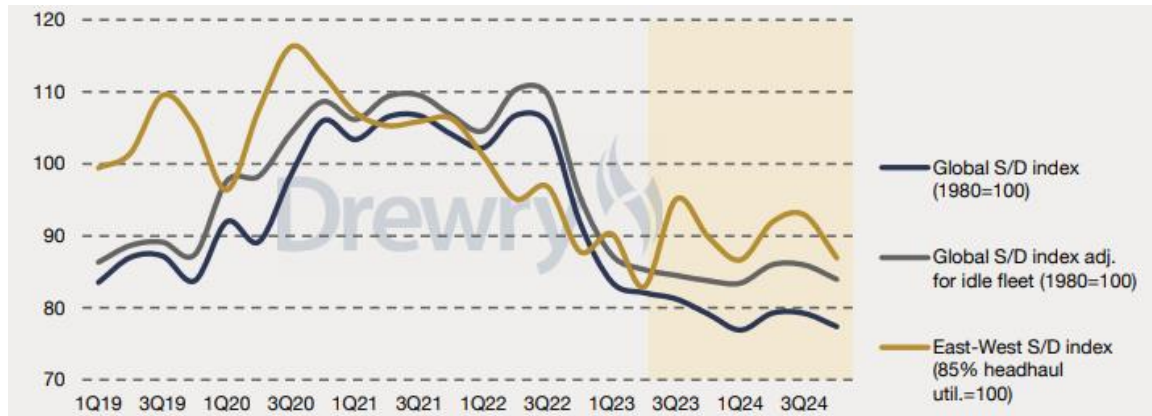
By contrast with the stability seen in the prevalence of consortia,⁷² the evaluation period has been characterised by dramatic changes in other market circumstances that, according to the 2019 evaluation report, drove the need for cooperation between carriers. More specifically, the evaluation period has seen a transitory and exceptional phase of excess demand over effective capacity (see Figure 3) and of record profits for carriers

⁷¹ Data submitted by the World Shipping Council.

⁷² As indicated, consortia remained prevalent even though large carriers became less reliant on alliances.

(see Figure 4). This transitory and exceptional phase has temporarily interrupted the trend towards oversupply and low profitability in the sector.

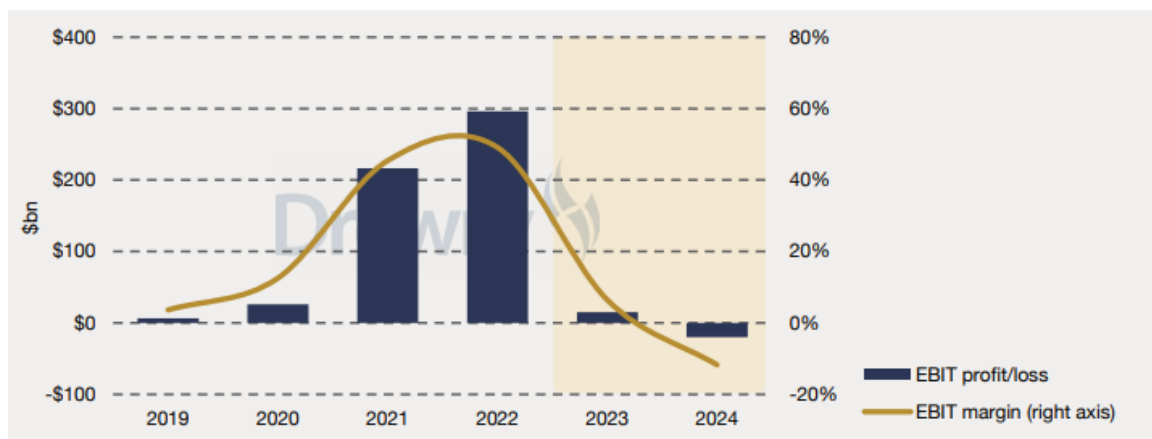
Figure 3 – Global and East-West supply-demand index 2019-2024e



Note: A figure of 100 represents equilibrium between supply and demand; above 100 demand exceeds supply; below 100 the opposite.

Source: Drewry Container Forecaster Quarter 2 – June 2023

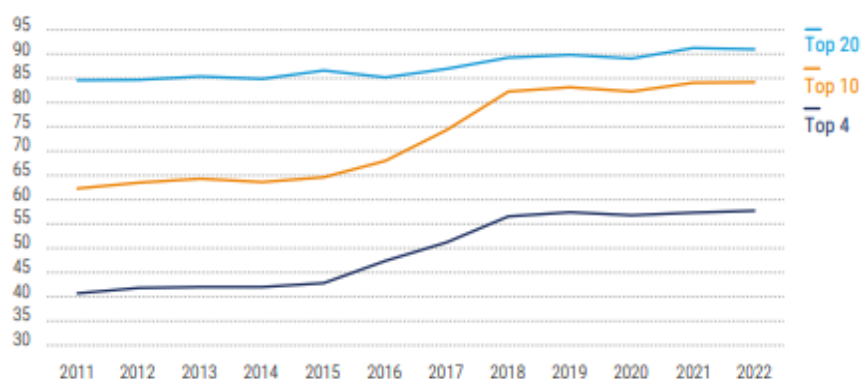
Figure 4 – Profitability of container liner shipping industry 2019-2024e



Source: Drewry Container Forecaster Quarter 2 – June 2023

In terms of the level of concentration during the evaluation period, the liner shipping sector did not undergo any major operation of horizontal consolidation, as illustrated by the flat shares of global capacity controlled by the top-four, top-10 and top-20 carriers (see Figure 5). The German carrier Hapag-Lloyd nevertheless acquired two small shipping lines focussed on Africa (Deutsche Afrika-Linien and NileDutch).

**Figure 5 – Shares of global capacity of top-four, top-10 and top-20 carriers
2011-2022**



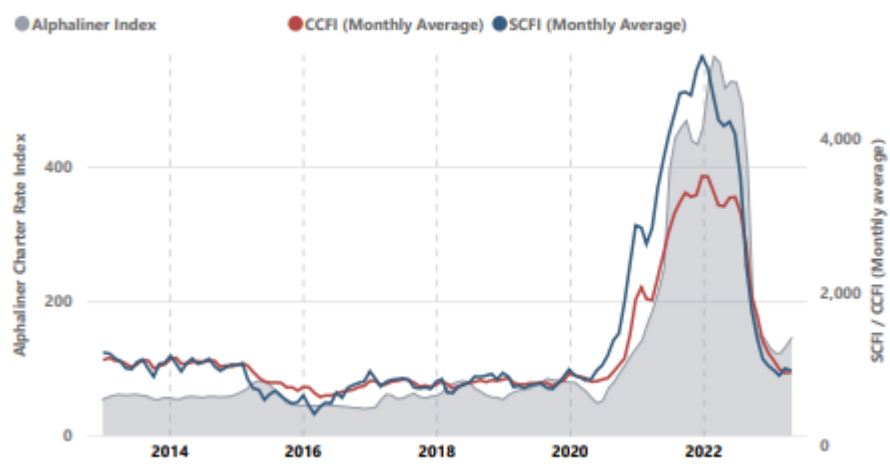
Source: UNCTAD, *Review of Maritime Transport 2022*

The trend towards vertical integration of carriers continued, with substantial investments in port and terminal operations. The four largest carriers are now among the top ten terminal operators worldwide, with COSCO and Maersk controlling respectively 13% and 11% of the global terminal throughput.⁷³ In addition, they have expanded their operations into logistics, notably Maersk and CMA CGM that pursue a strategy of offering end-to-end supply chain solutions to their customers.

In terms of freight rates, the evaluation period witnessed an extreme example of the “boom and bust” cycle in the liner shipping industry (see Figure 6).

⁷³ UNCTAD, *Review of Maritime Transport 2022*, p. 138, referring to Drewry (2022), Table 4.1: Global terminal operators’ throughput league table, 2021 per cent share of world container port throughput in TEU.

Figure 6 – 10-Year Alphaliner Charter Rate Index and Freight Rate Indices⁷⁴



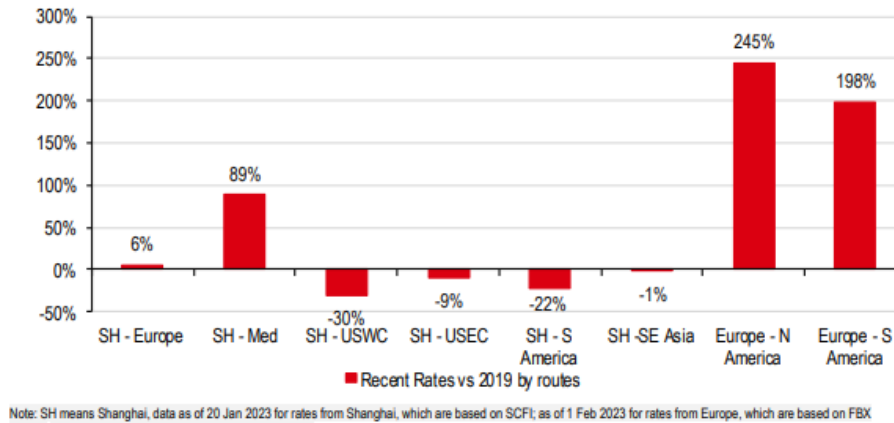
Source: Alphaliner, *Monthly Monitor* – May 2023

At the beginning of 2020, rates remained relatively stable, as carriers, which at the time had historically low order books, swiftly removed capacity from trades affected by a lowering of demand in the aftermath of the COVID-19 outbreak. Later in 2020, with economic stimulus packages and a shift of household spending from services to goods, demand for containerised transport increased on key routes, most notably on Far East-North America, while an increasing share of the global shipping capacity was taken out of the market due to supply chain blockages in ports and on land. As a result, freight rates steeply increased and peaked in January 2022, before collapsing in 2022 when demand deteriorated (reaching below 2019 levels in some trades), port congestion started to ease and newly ordered ships entered the market.

In January 2023, the SCFI was just 10% higher than 2019 levels, although the rapid pace of decline of the SCFI down to close to pre-COVID levels still concealed heterogeneous situations per trade (see Figure 7).

⁷⁴ The CCFI (China Containerized Freight Index) and the SCFI (Shanghai Containerized Freight Index) are widely used indices. The CCFI is a composite of spot rates and contractual rates which reflects the change in freight rates on 12 trade lanes to and from China using the index as of 1 January 1998, as 1 000 basis points. The SCFI shows, on a weekly basis, the most current freight prices (spot rates) for container transport from the Chinese main ports, including Shanghai (Chinese export). Other used indices, such as the Freightos Baltic Index (FBX) or Drewry's composite World Container Index (WCI), would show similar variations.

Figure 7 – Freight rates per trade – January 2023 vs 2019



Source: HSBC, *Global Freight Monitor*, 4 February 2023, based on Clarkson, Refinitiv Datastream

The pressure on freight rates is expected to remain in the short- to medium-term due to the easing of supply chain congestion and the delivery of new containerships (as of 1 June 2023, the orderbook-to-fleet ratio stood at 28%, based on capacity).⁷⁵ At the end of 2022, the effective capacity was predicted to rise by 19% in 2023.⁷⁶

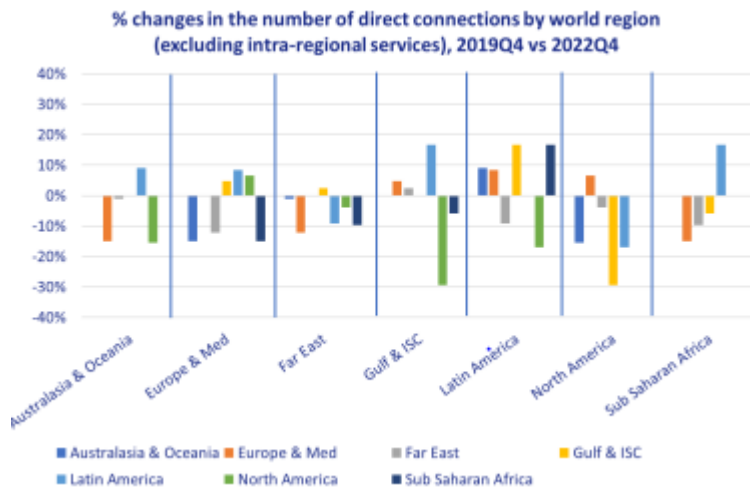
The vessel delays caused by and worsening the port and landside bottlenecks also degraded the quality of liner shipping services during the evaluation period. In terms of service availability, carriers adjusted their networks by allocating their vessels onto shorter services calling at only two world regions (i.e. shuttles) instead of services serving multiple regions. This led to a decrease in direct connectivity (i.e. number of country pairs that can be reached without transshipment)⁷⁷ over the evaluation period (2020-2023), a phenomenon that had nevertheless started before the COVID-19 crisis (see Figure 8).

⁷⁵ Drewry Container Forecaster Quarter 2 – June 2023.

⁷⁶ Drewry Container Forecaster Quarter 4 – December 2022.

⁷⁷ According to UNCTAD, counting on a direct regular shipping connection has empirically been shown to help to reduce trade costs and increase trade volumes. Research shows that the absence of a direct connection is associated with a 42% lower value of bilateral exports (see: <https://unctad.org/news/maritime-connectivity-countries-vie-positions>).

Figure 8 – Changes in the number of direct connections per world region (excluding intra-regional services) – Q4 2022 vs Q4 2019

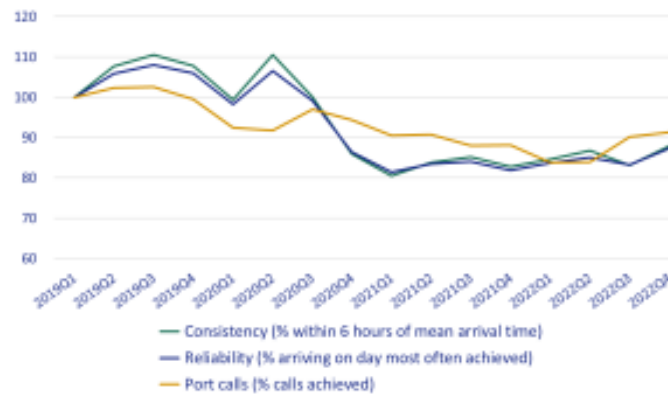


Note: The number of countries directly connected has declined by approximately 5% in Q4 2022 compared to Q4 2019; the capacity lost due to this reduction accounted for some 4% of the total capacity scheduled in Q4 2019.

Source: MDS Transmodal, Container Shipping Market Quarterly Review, Q4 2022 – March 2023

In terms of service performance, the reliability and consistency of services significantly degraded in the second half of 2020 until the second half of 2022. Despite gradual improvements, at the end of 2022, they were still significantly below 2019 levels (see Figure 9).

Figure 9 – Global liner shipping service performance – Index Q1 2019 = 100



Source: MDS Transmodal, Container Shipping Market Quarterly Review, Q4 2022 – March 2023

4. EVALUATION FINDINGS (ANALYTICAL PART)

4.1. To what extent was the intervention successful and why?

The question of the success of the CBER requires an assessment of whether it has (i) brought legal certainty to carriers (section 4.1.1); (ii) simplified administrative supervision of the sector (section 4.1.2); (iii) remained coherent with EU and international rules (section 4.1.3); and (iv) facilitated the creation and operation of pro-competitive consortia (section 4.1.4). Conclusion on whether, overall, the CBER promoted competition is then drawn (section 4.1.5).

4.1.1. Legal certainty

Carriers, in particular large carriers,⁷⁸ consider that the findings in the 2019 evaluation report as to the legal certainty brought by the CBER still hold true. They reiterate that it contributes to legal clarity by providing more specific and concrete guidance than general instruments of competition law and raises levels of compliance by leaving less space for misinterpretation of the rules.

Nevertheless, those carriers do not substantiate their claim about the alleged insufficiency of the horizontal guidance that will still be available to them without the CBER, in particular the Horizontal Guidelines on joint production agreements and sustainability agreements, the Specialisation Block Exemption Regulation and the Article 101(3) Guidelines.⁷⁹

⁷⁸ The carriers that expressed their views as to the legal certainty brought by the CBER are mainly large carriers belonging to the three global alliances. It appears that smaller carriers having replied to the targeted questionnaire were not in a position to provide informed views as to the legal certainty brought by the CBER. This is because smaller carriers indicated that either they did not assess compliance of any of their consortia with EU competition law over the evaluation period, or if they did, they used the CBER for mere guidance due to non-compliance with the 30% maximum market share condition.

⁷⁹ At the time of the consultation activities for the evaluation of the CBER, the Horizontal Guidelines and the Specialisation Block Exemption Regulation were under review. The new versions were published in the Official Journal on, respectively, 21 July 2023 (OJ C 259/1) and 2 June 2023 (OJ L 243/20) and could not, therefore, be used by carriers to maintain or amend their original claims about their lower effectiveness compared to the CBER. The World Shipping Council nevertheless provided arguments on that matter using the draft new versions used for the public consultation (https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en). The World Shipping Council notably raised the issue of the applicability of the Specialisation Block Exemption Regulation to consortia services (or more generally to jointly operated services) based on the draft new version. It is noted that the final version of the new Specialisation Block Exemption Regulation (as published on 2 June 2023) gives, as an example of joint preparation of services, “*cooperation in the creation or operation of a platform through which a service will be provided*” (recital (6)). The reference to the joint operation of assets through which a service is provided indicates that consortia are a form of joint production agreement that may be block-exempted if they fulfil the conditions set out in the revised Specialisation Block Exemption Regulation.

In this document, further references to the Horizontal Guidelines and the Specialisation Block Exemption Regulation should be understood as encompassing provisions applicable at the time of the

To the contrary, carriers' responses to the fact-finding questionnaires sent in December 2021⁸⁰ tend to demonstrate an incomplete or inconsistent understanding of the substantive provisions of the CBER, in particular of (i) the types of agreements that fall within the definition of consortia and should be taken into account in the calculation of market shares; (ii) the market(s) relevant for the calculation of the market share(s); (iii) the application, to consortia serving more than one trade, of the conditions for exemption relating to market share; and (iv) the need to be able to demonstrate compliance with the conditions set out in the CBER.

Regarding point (i), while there is consensus among carriers that highly integrated cooperation arrangements, such as vessel-sharing agreements and alliances, are consortia, carriers voice uncertainty as to the correct treatment of more flexible cooperation arrangements, such as slot charter and slot exchange agreements. For example, some carriers consider stand-alone, non-reciprocal slot charter agreements as consortia (although they are not consortia within the meaning of the CBER)⁸¹ whereas others do not declare their slot exchange agreements with other carriers active on the same market as consortia (although they are consortia within the meaning of the CBER).⁸² This confusion may be explained by, e.g.: the difficulty in distinguishing between a reciprocal and non-reciprocal slot charter, or between a slot charter and a slot exchange (the slot exchange may be defined as a form of remuneration under the slot charter agreement); the diverging definitions of the relevant geographic markets between carriers; the interrelations between the different forms of cooperation agreements, such as a vessel sharing agreement also including slot charter agreements between the parties; or the existence of situations in which the market share of a slot charter should be taken into account when establishing the market share of the consortium.

Regarding point (ii), the differences in the market definitions adopted by carriers relate to the relevant geographic market and appear to fall within two categories: differences in the ranges of ports considered as substitutable (e.g. European ports vs. Northern

consultation activities and which remain substantially unchanged in the new versions published on, respectively, 21 July 2023 and 2 June 2023.

⁸⁰ As referred to in the Call for Evidence in the “data collection and methodology” section.

⁸¹ Considering that a slot charter agreement does not involve any cooperation between two or more vessel-operating carriers in the joint operation of a maritime transport service, it is not a consortium within the meaning of Article 2(1) of the CBER.

⁸² In contrast to a slot charter agreement, a slot exchange agreement involves the cooperation between two or more vessel-operating carriers in the joint operation of a maritime transport service. It is therefore a consortium within the meaning of Article 2(1) of the CBER. See also CBER, recital (3): “*Consortium agreements vary significantly ranging from those that are highly integrated, requiring a high level of investment for example due to the purchase or charter by their members of vessels specifically for the purpose of setting up the consortium and the setting up of joint operations centres, to flexible slot exchange agreements.*”

European or Mediterranean ports);⁸³ and differences in the approaches to ports of call (intermediary stops). On the latter, most carriers rely on the Commission’s decisional practice and guidance⁸⁴ and define the relevant geographic market on the basis of the ports at each end of the trade (excluding the ports of call), e.g. Far East-North Europe only, even though the joint service serves ports of call in other regions (e.g. Indian Subcontinent, Mediterranean). However, some carriers define separate geographic markets on the basis of the ports of call included in the joint service, e.g. Far East-North Europe, Indian Subcontinent-North Europe and Mediterranean-North Europe.⁸⁵

Regarding point (iii), some carriers, including large carriers belonging to global alliances, raise the question of the treatment, under the CBER, of consortia active on several trades (used, for the purposes of this evaluation report, as a proxy for the relevant geographic markets⁸⁶) and the application of the condition relating to market share set out in Article 5 of the CBER to multi-trade consortia. Specifically, there is uncertainty among carriers, due to the reference in Article 5 of the CBER to “*the relevant market*”, as to whether multi-trade consortia may benefit from the CBER for those relevant markets in which their market share is below the 30% threshold, whereas they would be subject to self-assessment for those relevant markets in which their market share exceeds the 30% threshold.

Regarding point (iv), as an example, some large and small carriers have indicated that, due to lack of data, they do not know the volumes carried by other consortium members on a trade, although such information is necessary to ensure compliance with one of the conditions set out in the CBER.

In that context, no carrier has been able to provide robust and comprehensive data on the consortia to which it belongs which would be covered by the CBER. The finding of an incomplete or inconsistent understanding of the substantive provisions of the CBER is valid for all categories of carriers having responded to the fact-finding questionnaires (large carriers members of global alliances and smaller carriers). In addition, it seems that

⁸³ See CBER, recital (7). This recital also recalls that account should be taken, where appropriate, of other modes of transport for the purpose of assessing the relevant market. However, no carrier has raised the issue of substitutability between liner shipping services and other freight services.

⁸⁴ See Maritime Guidelines, paragraph 20.

⁸⁵ This is also the approach adopted by the World Shipping Council in its response to the call for evidence. However, it acknowledges that this approach deviates from the one applicable under the CBER (“*some services appear under multiple trade routes. For example, services operating on Europe / Far East services calling en route in Middle East and South Asia are included in the Middle East and South Asia trade although the service can also cover Far East. Such a service would therefore be included in both the Europe – Middle East and South Asia and the Europe – Far East table in the below. The geographic scope of the table is hence relatively broad and may include services that may not compete with each other directly. The tables do not therefore represent relevant markets for the purposes of a competition law assessment*”, see also footnote 89 below).

⁸⁶ See also footnote 65 above.

this situation derives from the fact that the CBER, despite being a block exemption regulation, still requires a case-by-case, sometimes detailed, assessment of the nature and scope of each cooperation agreement entered into by carriers. As a consequence, the issue of misunderstanding of the rules does not appear to be solvable by further clarification efforts by the Commission.

Furthermore, carriers insist on the importance, for effective enforcement and industry discipline, of the hard-core restrictions set out in the CBER. Yet, they do not explain how they distinguish between the CBER's prohibition of capacity limitations (a hardcore restriction under Article 4(2)) and the right to make capacity adjustments in response to fluctuations in supply and demand (as provided for in Article 3(2)). This tension between provisions of the CBER on capacity management has been a regular cause of disagreement between carriers and transport users during the evaluation period, which is illustrative of the diverging views as to the terminology used in the CBER.⁸⁷ Carriers consider that the simplicity of the terms and notions used in the CBER (e.g. capacity adjustments, operation of terminals, data exchange systems) is a source of legal certainty and self-discipline, while freight forwarders and ports consider that it allows carriers to adopt an overly wide interpretation of the exempted activities and deters enforcement actions under EU competition law. While such uncertainty as to the boundaries of the block-exempted activities arguably existed during the previous evaluation period, it was not deemed critical for the effectiveness of the CBER in a context of oversupply and low prices. The provisional capacity shortage faced by transport users in the aftermath of the COVID-19 crisis reignited the debate about the need to ensure that the CBER is interpreted restrictively and consistently by all players of the supply chain.

Importantly, out of the approximately 43 unique consortia serving EU ports in 2020, only 13 unique consortia had a market share⁸⁸ below the 30% threshold established by the CBER.⁸⁹ Out of those 13 unique consortia, 11 involved a (large) carrier which, on the

⁸⁷ Similarly, the provisions of the CBER on capacity management may require a case-by-case, and possibly in-depth, assessment by carriers of the conditions under which adjustments of capacity are implemented. It appears difficult to address the interpretation issues that those provisions raise by trying to clarify the CBER.

⁸⁸ The market share of a consortium is defined in the CBER as the sum of the individual market shares of its members, taking account of all the volumes carried by the said members (within or outside the consortium).

⁸⁹ In its response to the call for evidence, the World Shipping Council considers that *“a significant number of consortia operating on trades to/from the EU are likely to fall below the applicable 30% market share threshold specified in the CBER.”* However, it appears that, to determine the number of consortia operating to/from the EU, the World Shipping Council has considered that each relevant geographic market in which a consortium is active should give rise to the definition of a distinct consortium. This approach does not seem in line with the definition of a consortium as a single- or multi-trade agreement or set of agreements in Article 2(1) of the CBER (see also footnote 61 above). In any case, the statement of the World Shipping Council is based on data that are not market shares of consortia within the meaning of the CBER. There are in particular two major methodological issues, which are acknowledged in the annex to the submission of the World Shipping Council: (i) the geographic scope of a service, as defined in the submission of the World Shipping Council, is *“relatively broad and may include services that may not compete with each other directly”*. Therefore,

same trade, belonged to at least one other consortium above the 30% market share threshold and was, consequently, subject to self-assessment.⁹⁰ The remaining two block-exempted consortia, active on the same trade (North Europe-West Africa), include smaller carriers that have been acquired by a larger carrier since then. This means that large carriers have almost systematically to self-assess consortia in parallel to block-exempted consortia. Yet, no large carrier has pointed to any specific provision of the horizontal guidance currently available to facilitate self-assessment, which would give rise to greater uncertainty compared to the CBER.

In fact, the Horizontal Guidelines appear better adapted to the objectives of the CBER and the competitive structure of the sector than the operative provisions of the CBER. In particular, the sector is characterised by the existence, on some trades and at global level, of (i) parallel consortia and interlinkages between consortia, as well as (ii) a trend towards the vertical integration of carriers, i.e. carriers expanding in upstream (e.g. port or terminal operations), downstream (e.g. freight forwarding services) and/or adjacent markets (e.g. door-to-door services)⁹¹. Such competitive structure would call for a case-by-case assessment of the market power of carriers on the relevant markets.⁹²

this geographic scope may not correspond to the relevant geographic market within the meaning of the CBER; and (ii) the share of a consortium is based on the capacity deployed, not on the volume of goods carried as required by the CBER.

⁹⁰ For the avoidance of doubt, a consortium active on more than one trade would be considered as exceeding the 30% market share threshold if it exceeds the 30% threshold on at least one of the trades on which it is active. Conversely, a consortium would be considered as complying with the 30% market share threshold if it does not exceed the 30% threshold on any of the trades on which it is active. This notably means that, since each of the three global alliances has a market share above the 30% threshold on at least one of the trades it covers, none of them is exempted under the CBER.

⁹¹ For the purpose of this evaluation, the categorisation of upstream, downstream and adjacent services should be considered as indicative.

⁹² Prior to the adoption of the CBER in 2009, the Commission had initially proposed to take account of the existence of interlinkages between consortia in the calculation of the market share of a consortium for the application of the 30% ceiling. More specifically, under the Commission's preliminary draft (see Notice pursuant to Article 4 of Council Regulation (EEC) No 479/92 on the application of Article 81(3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies ('consortia'), OJ C 266, 21.10.2008, p. 1), the market share of a consortium would have been calculated by adding the individual market shares of its members as well as of the other members of other consortia involving at least one of its members on the same trade. The Commission however subsequently replaced that initial proposal with a recital providing for the possibility to withdraw the benefit of the CBER taking account of the negative effects on effective competition deriving from consortia interlinkages. In 2020, no consortium would have been exempted if the Commission had not replaced its initial proposal.

Example: Three carriers operate on a trade (A, B and C) as part of two consortia (consortium 1, made up of A and B; consortium 2, made up of A and C). Under the CBER, the market share of consortium 1 is calculated by adding the market shares of A and B; the market share of consortium 2 is calculated by adding the market shares of A and C. Under the proposal prior to the adoption of the CBER in 2009, the market share of each of consortia 1 and 2 would have been calculated by adding the market shares of A, B and C.

With regard to point (i), the Horizontal Guidelines explain why the Commission views the interlinkages between carriers, as referred to in recital (12) of the CBER, in a more negative light. The new Specialisation Block Exemption Regulation and the new Horizontal Guidelines contain a ground for withdrawal referring to the interlinkages between parties to joint production agreements,⁹³ corresponding to the ground for withdrawal set out in the CBER.

With regard to point (ii), at the time of the adoption of the CBER, it had been acknowledged that the joint use by consortia of production assets (e.g. terminals) controlled by one of their members was a potential source of economies of scale, which supported the inclusion of the joint use or operation of such assets in the list of block-exempted activities. However, it was also noted that notwithstanding those benefits, the joint use of a terminal owned by a consortium member with a strong market position in the market for container terminal services may give rise to foreclosure concerns.⁹⁴ Despite these concerns, the CBER does not contain any measure dependent on the market position of consortia members on vertically-related markets.

By contrast, the Horizontal Guidelines recall that production agreements affect the markets directly concerned by the cooperation, namely the markets to which the products produced under the agreement belong, but may also affect markets upstream, downstream or neighbouring the markets directly concerned by the cooperation (“spill-over markets”). Such spill-over markets are likely to be relevant for the assessment if the markets are interdependent and the parties have a strong position on the spill-over markets.⁹⁵ Along those general lines, the 20% market share threshold set out in the Specialisation Block Exemption Regulation applies not only to the market of the joint products (e.g. liner shipping services), but also the markets on which such joint products are used captively as inputs (e.g. freight forwarding services).⁹⁶ In addition, the Horizontal Guidelines contain specific guidance for the exchange of information by vertically-integrated companies, which would helpfully alleviate concerns expressed by certain transport users as to the lack of safeguards in the CBER against the risks of anti-competitive foreclosure entailed by the exchange of information between vertically-integrated carriers.⁹⁷

⁹³ See new Specialisation Block Exemption Regulation, Article 6 and new Horizontal Guidelines, paragraphs 213-214.

⁹⁴ See Commission services document, Technical paper on the revision of Commission Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) as last amended by Commission Regulation (EC) 611/2005 of 20 April 2005, paragraph 27.

⁹⁵ See new Horizontal Guidelines, paragraph 183.

⁹⁶ See new Horizontal Guidelines, paragraphs 184 and 202.

⁹⁷ See new Horizontal Guidelines, paragraph 383.

4.1.2. Administrative supervision

The CBER aims at simplifying administrative supervision by providing a framework for the Commission, national competition authorities and national courts for the assessment of horizontal cooperation agreements between carriers. The lack of recent enforcement actions against consortia in the EU or at national level makes it difficult to conclude on the extent to which the CBER simplifies supervision by authorities and courts and, if so, whether such simplification is not achieved to the detriment of effective enforcement.

The views of stakeholders are mixed. On the one hand, representatives of freight forwarders and transport users are concerned that the existence of the CBER has discouraged the Commission and national competition authorities from enforcement action against practices that allegedly infringe Articles 101 or 102 TFEU. Furthermore, the German national competition authority considers that it is time for a systematic review of whether the existing alliances and vessel-sharing agreements comply with Article 101 TFEU.

On the other hand, carriers generally claim that the binding nature of the CBER compared to guidelines provides greater legal certainty. It is noteworthy that carriers do not contemplate the possibility for the Commission or a Member State to withdraw the benefit of the CBER, although the Commission had identified the complex network of cross-membership consortia, about which also the German national competition authority raises serious concerns, as a ground for withdrawal.⁹⁸ Furthermore, carriers seem to acknowledge the lack of clarity as regards determining the scope of the CBER in practice (due e.g. to the difficulty in assessing compliance with the market share threshold), which further weakens their claim as to the contribution of the CBER to a safe and stable legal framework at EU and national levels.

4.1.3. Coherence

Carriers consider that, based on the 2019 evaluation, it seems uncontroversial that the CBER is coherent with EU competition law. They nevertheless note that the Specialisation Block Exemption Regulation, subject to being applicable to shipping services, would apply to fewer consortia due to its lower market share threshold (20%). Furthermore, the carriers consider that, compared to the Horizontal Guidelines, the CBER lays out more clearly the activities that are and are not allowed under Article 101(1) TFEU and thus facilitates self-policing. Beyond coherence with EU competition law, carriers generally submit that the CBER is coherent with the EU transport policy, notably the Sustainable and Smart Mobility Strategy, and the EU environmental policy, through its contribution to the EU Green Deal.

⁹⁸ See CBER, recital (12). In that respect, it is worth noting that the Commission has, under the EU Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings), raised competition concerns where the merged entity would, as a result of the transaction, belong to different consortia on the same trade (see e.g. Case M.8330 – *Maersk Line/HSDG*; Case M.8120 – *Hapag-Lloyd/United Arab Shipping Company*).

Other stakeholders, notably organisations representing transport users and consumers, take the opposite view. They consider that the CBER is not coherent with Article 101(3) TFEU anymore, as it cannot be concluded with a sufficient degree of certainty that currently consortia fulfil the conditions on efficiencies and consumer benefits. They acknowledge that, under previous market conditions, their views as to the compliance of consortia with Article 101(3) TFEU may have been different. However, they submit that the sector has radically changed with horizontal consolidation and vertical integration of supply chain functions. They add that carriers have demonstrated their ability to form and operate consortia, even though most of them fell outside of the scope of the CBER. In that respect, they note that similar forms of cooperation exist in other economic sectors (such as the aviation sector), without sector-specific rules.⁹⁹ They also note that the lack of conditionality for the block exemption of certain activities, such as the use of a computerised data exchange system, is at odds with the safeguards included in the Horizontal Guidelines regarding information exchanges.

The feedback received from organisations representing transport users and consumers as to the coherence of the CBER with other EU interventions and policies shows that the assessment of that criterion largely overlaps with the assessment of the relevance criterion, specifically of the degree of certainty with which it can be concluded that block-exempted consortia complied with the conditions of Article 101(3) TFEU over the evaluation period. This overlap results from the broad definition of the efficiencies and consumer benefits that may be taken into account under Article 101(3) TFEU (i.e. improving the production or distribution of goods or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit) and which, to a large extent, correspond to the potential contributions of block-exempted consortia to the broader EU priorities, notably a European Green Deal, a Europe fit for the digital age and an economy that works for people.

The feedback received from carriers and their representatives supports the common assessment of the external coherence¹⁰⁰ and relevance of the CBER. As an illustration, the World Shipping Council refers to prior findings by the Commission that consortia can lead to better coverage of ports to substantiate its opinion about the contribution of consortia to trading opportunities and the coherence of the CBER with the EU maritime transport policy. It also refers to the environmental efficiencies brought by consortia to

⁹⁹ Recital (5) of the Enabling Regulation explains some of the structural features of the liner shipping sector that justified the adoption of sector-specific rules, notably the fact that liner shipping is a capital intensive industry, meaning that there is a high proportion of fixed to variable costs (see also Communication by the Commission of 18 June 1990, Report on the possibility of a group exemption for consortia agreements in liner shipping, COM(90) 260 final, p. 2.). However, as recalled in recital (3) of Council Regulation (EC) No 1419/2006, liner shipping is not unique as its cost structure does not differ substantially from that of other industries.

¹⁰⁰ Checking the external coherence of the CBER means looking at how the CBER operates to achieve the objectives of other (“external”) interventions, notably in relation to EU competition law or other EU policies such as the European Green Deal (see Better Regulation Toolbox dated 25 November 2021, Tool #47, p. 408).

substantiate its opinion on the coherence of the CBER with the EU environmental policy and to the macroeconomic benefits of consortia in relation to the contribution of the CBER to broad EU objectives such as an economy that works for people and a stronger Europe in the world.

In this context, the question of the external coherence of the CBER, insofar as it relates to the efficiencies and benefits (including environmental ones) attributable to exempted consortia, will be treated as part of the assessment of the relevance of the CBER.

4.1.4. Facilitation of pro-competitive consortia

Carriers argue that the CBER reduces the time and costs spent on assessing compliance of consortia with EU competition law, which would be a disproportionate burden for smaller carriers. The robustness of that argument needs to be nuanced in view of the responses to specific questions about the savings achieved through the CBER and the latter's role in the decision to create or operate a consortium.

First, due to the global nature of liner shipping and the absence of a harmonised antitrust regime, no carrier has indicated that it assesses compliance of a consortium with EU competition law only. Second, nearly half of the carriers were not in a position to quantify the costs of assessing compliance of their consortia with EU competition law or the savings entailed by the CBER. In that respect, a small carrier has indicated that it does not distinguish between consortia above or below the 30% market share ceiling when self-assessing their compatibility with Article 101 TFEU. More generally, since large carriers generally belong on a given trade to consortia that fall within and outside the CBER, they cannot rely solely on the CBER to ensure compliance of their activities with Article 101 TFEU. They carry out a self-assessment for the relevant consortia falling outside of the CBER, which they communicate to other consortia members (including smaller carriers, if any). Third, carriers generally consider that the CBER enables them to respond with more agility to business opportunities. For example, they indicate that the CBER enables them to test a new service by co-loading limited volumes with another carrier, which would be insufficient to justify the time and costs required for a self-assessment. However, carriers do not explain why the general principles applicable to the self-assessment of horizontal agreements with such specific features (small-volume markets and membership of a small undertaking representing an insignificant increment to the overall market share of the parties to the agreement)¹⁰¹ do not contribute to a material reduction of the time and cost difference between a self-assessment and an assessment of the compliance with the CBER conditions. Fourth, the yearly compliance costs incurred by the carriers that reported on them are marginal.

The likely insignificance of the compliance costs compared to the carriers' operating costs may explain why no carrier has identified the CBER, or more generally the scope of the applicable antitrust exemption, as a factor for the decision to enter into a

¹⁰¹ As recalled in recital (4) of the CBER.

consortium on a trade or for the allocation of capacity between independent and joint services, or between joint services. There is consensus that such decision is guided first and foremost by the commercial needs of large carriers and the feasibility of the cooperation (i.e. ability of other carriers to commit efficient and interoperable vessels, which excludes certain small operators, and the willingness to cooperate), as well as the individual strategies and business models of the carriers, as illustrated by the recent announcement of the dissolution of the 2M alliance between Maersk and MSC.¹⁰²

The above responses of carriers as to their motives for initiating cooperation, which only remotely relate, for small and medium-sized carriers, to tackling the cost disadvantage they face compared to large carriers, shed some light on the reasons why (i) all consortia active in the EU involved at least one of the five largest carriers worldwide (MSC, Maersk, CMA CGM, COSCO and Hapag-Lloyd), and (ii) the share of capacity operated by consortia on thin trades (e.g. North-South trades) is lower than on thick trades (e.g. East-West trades), whereas the need to consolidate demand to achieve economies of scale and density would in fact be higher on thin trades than on thick trades.¹⁰³

4.1.5. Conclusion

For the purposes of the evaluation of the CBER, the first issue to be assessed is the extent to which the CBER was successful over the 2020-2023 period, i.e. the extent to which the CBER achieved its objectives effectively, efficiently, and in a coherent way during that period.

The effectiveness and efficiency of the CBER rest primarily with the legal certainty that it brings to carriers, notably small or medium-sized carriers which may be deterred from entering into pro-competitive partnerships due to the costs and risks associated with EU antitrust rules. While carriers generally perceive that the CBER brings legal certainty, their feedback also demonstrates that it has limited effects on their ability to assess the lawfulness of their cooperation agreements. Furthermore, certain transport users do not share the carriers' perception and rather consider that the CBER has less clear boundaries than other EU antitrust rules, notably the Specialisation Block Exemption Regulation, despite having the same purpose (i.e. making it easier to cooperate in ways which are economically desirable and without adverse effects from the point of view of competition).

In addition, based on the data collected from carriers and the external contractor, it appears that none of the block-exempted consortia active on trades to or from the EU in

¹⁰² In that respect, Maersk confirmed that the discontinuation of its 2M alliance with MSC “*had nothing to do with recent regulatory scrutiny of the container shipping industry*” (25 January 2023).

¹⁰³ The end of 2M in 2025 may modify that finding in terms of capacity share controlled by consortia on the East-West trades. However, it is unlikely that the change from three operators (2M, Ocean Alliance and THE Alliance) to four operators (MSC, Maersk, Ocean Alliance and THE Alliance) will significantly change the competitive dynamics on the trades, in particular the ability of smaller carriers to operate profitably and gain traction.

2020 was made of small or medium-sized carriers only, whose number, due to the consolidation of the sector already observed in the 2019 evaluation report, has significantly decreased. In addition, there were only two block-exempted consortia that had no interlinkage (i.e. no common member) on the same trade with consortia falling outside of the scope of the CBER for exceeding the 30% market share threshold. This means that there were only two consortia that were not in the situation which may in particular, according to the CBER, lead to the withdrawal of its benefit. The acquisition of certain specialised carriers by carriers active globally over the 2020-2023 period is even expected to have put an end to this exception.

Therefore, overall, evidence tends to show that block-exempted consortia have become a tool for large carriers, which appear to have scale on their own, to complement their offerings rather than a tool for smaller carriers to reach scale and remain competitive in terms of costs and frequencies. Consequently, over the evaluation period, the CBER does not appear to have fulfilled its goal of promoting competition by enabling smaller carriers to cooperate between themselves and offer alternative services in competition with larger carriers.

Considering that the coherence of the CBER depends on the extent to which block-exempted consortia bring efficiencies and benefits contributing to the achievement of EU and international policy objectives, notably the EU Green Deal objectives, the coherence of the CBER will be assessed together with its relevance by reference to the conditions of Article 101(3) TFEU.

4.2. How did the EU intervention make a difference and to whom?

As rightly pointed out by some stakeholders, notably representing freight forwarders and ports, the CBER is no “EU established policy.”¹⁰⁴ The CBER is an exceptional regime, the extension of which is subject to the Commission collecting sufficient evidence that such sector-specific rules are needed, appropriate and that the conditions of Article 101(3) TFEU are still fulfilled.

Trade unions unanimously call for the expiry of the CBER, pointing to the deterioration of the quality of liner shipping services and the trend towards the establishment of an oligopoly, which threatens fair competition in the logistics supply chain and negatively affects employment and workers.

Organisations representing freight forwarders and ports consider that the CBER, together with favourable tax schemes (e.g. tonnage tax schemes), have granted unfair advantages

¹⁰⁴ There are other jurisdictions in which specific exemptions from competition law apply to the liner shipping sector. Those exemptions take either the form of exemptions comparable to the CBER and applicable to horizontal agreements between carriers (e.g. Hong Kong, Singapore, Israel, UK) or of legislations setting the sector out of the general competition law regime (e.g. US, China, Canada, Australia, South Korea, Taiwan or Japan). The existence of exemptions in other jurisdictions does not call into question the exceptional nature of the CBER.

(e.g. ability to generate higher profits over a longer period) to the vertically-integrated carriers with which they compete. This opinion echoes the concerns expressed during the previous evaluation of the CBER, during which stakeholders other than carriers and shipowners had submitted that the CBER, while it originally functioned well, now benefitted almost entirely the shipping lines and worked to the detriment of other stakeholders of the logistic chain.¹⁰⁵

Organisations representing freight forwarders and ports thus argue that the expiry of the CBER would help to restore trust and a level playing field between the different logistics providers.

In that respect, carriers warn that a decision taken by the Commission not to renew the CBER may be interpreted by other jurisdictions as a signal that consortia should no longer be regarded as beneficial to consumer welfare. They claim that this might have a chilling effect on cooperation between carriers and eventually negatively impact EU trade. However, in view of the limited number of carriers actually benefitting from the CBER, the weight of consortia (alliances) operating outside the scope of the CBER on the key East-West trades¹⁰⁶ and the marginal effect of antitrust exemption on carriers' decisions to enter into a consortium, the risk identified by carriers that the expiry of the CBER may have a deterrent effect on pro-competitive cooperation appears low. In addition, as highlighted by certain other stakeholders and noted already in the 2019 evaluation report, consortia-like agreements could be formed and operate successfully without a block exemption regulation, on the basis of general guidance as done in other sectors, most notably in the airline sector.¹⁰⁷

Finally, transport users and two responding Member States call for reinforced scrutiny of the container shipping sector. In doing so, they signal that, in their view, the balance between the needs of effective supervision and administrative simplification pursuant to Article 103 TFEU which originally supported the adoption of the CBER¹⁰⁸ has shifted and that carriers should be subject to the same EU antitrust rules as other economic operators active in the EU.

In conclusion, while carriers prominently continue to support the existence of a sector-specific regime in the EU, evidence gathered during the evaluation shows that the CBER did not make any material difference for its primary target beneficiaries (small and medium-sized carriers), while fuelling the discontent of transport users during the

¹⁰⁵ See 2019 evaluation report, p. 47.

¹⁰⁶ Each of the three global alliances active during the evaluation period (2M, Ocean Alliance and THE Alliance) has exceeded the 30% market share ceiling on at least one of the Far East-Europe or transatlantic trades since their creation.

¹⁰⁷ See 2019 evaluation report, p. 48.

¹⁰⁸ See Enabling Regulation, recital (3).

evaluation period. Therefore, the outcome of the consultation activities raises doubt as to whether action at EU level through the CBER continues to be justified.

4.3. Is the intervention still relevant?

The question of the relevance of the CBER requires an assessment of whether (i) it can be concluded with a sufficient degree of certainty that block-exempted consortia continue to meet the conditions of Article 101(3) TFEU (section 4.3.1); and, from a more macro-economic perspective, (ii) cooperation between carriers continues to contribute to the improvement of the competitiveness of the EU liner shipping industry and the development of EU trade (section 4.3.2).

The assessment of the benefits brought by block-exempted consortia underlying the assessment of the relevance of the CBER is subject to two preliminary comments.

First, as indicated in section 1.1, in view of the extremely volatile market conditions over the evaluation period and the temporary price hikes and service disruptions in 2020-2022, there is a need for a re-examination of the causal links between the existence of block-exempted consortia and the benefits for the users of their services, which had been presumed in prior reviews of the CBER. For that purpose, interested parties were invited to provide qualitative and quantitative evidence to test the consumer welfare-enhancing effects of consortia over the evaluation period.¹⁰⁹

Second, the assessment of the benefits brought by consortia relies primarily on an analysis of the quantitative evidence submitted by carriers, which have not distinguished between consortia within and outside the scope of the CBER. Carriers' approach may be explained by the difficulty in identifying the specific effects of block-exempted consortia, due to the limited number of such consortia, especially on thick East-West trades, and the membership of large carriers in different consortia on the same trade, some of which fall within and some outside the CBER. In this context, although the assessment of the relevance of the CBER should theoretically focus on block-exempted consortia, it has been in practice necessary to carry out an assessment of the effects of consortia in general.

4.3.1. Efficiencies and consumer benefits brought by consortia

Carriers submit that consortia, whatever their market shares, are industry tools that function to the benefit of customers and of the fight against climate change. On the one hand, they create substantial economic gains for customers, both in terms of reducing

¹⁰⁹ See Call for evidence for the CBER evaluation published on 9 August 2023: *“replies to the targeted questionnaires sent to transport users (freight forwarders, shippers and their associations) and ports (port and terminal operators and their associations) will be useful, to give the Commission a comprehensive view of the relevance of the Regulation since 2020. The replies will test the effects of consortia on the efficiency of transport operations, the productivity of other logistics operators and the ability of consortia to bring consumer benefits, compared to independent operators, in stressed market conditions.”*

costs for them and delivering better service quality, by allowing a wider footprint of ports called by carriers and therefore shorter transit times. On the other hand, they contribute to reducing CO₂ emissions, by allowing the deployment of fewer vessels, of larger size and powered by more efficient technologies from an environmental standpoint (e.g. LNG, methanol).

For the reasons explained below, the evidence submitted by carriers seems insufficient to conclude on whether consortia systematically deliver the consumer benefits claimed by carriers to the standard required pursuant to Article 101(3) TFEU.

Limitations of the econometric assessment

In support of carriers' claims, two econometric studies, which are complementary, have been submitted by the carriers.

The first study mainly attempts to demonstrate that consortia were pro-competitive before 2020 and remain pro-competitive now that overcapacity is looming again. It nevertheless contains an acknowledgement of the two major methodological limitations that impede the demonstration of the causal link between consortia and the claimed benefits for transport users.

First, as a result of the prominence of consortia since the inception of the liner shipping industry, it is not possible to compare the conditions for the provision of liner shipping services on a trade with and without consortia (i.e. there is no real-life counterfactual). The services operated on a stand-alone basis by a carrier belonging to a consortium on the same trade do not offer a reliable point of comparison, since either the two services consist in the same port rotations and are not marketed separately, or they consist in different port rotations and serve different demands. Therefore, the provision of stand-alone services by carriers seems influenced by those they offer as members of consortia, so that those stand-alone services do not appear to properly reflect how carriers would operate absent consortia.

Second, many factors of the joint production of liner shipping services are interdependent and interlocked. Such endogeneity creates problems in the regression model used in the study to infer causality between consortia and the claimed efficiencies. As an example, the study observes that the freight volumes increased at a port after an alliance started directly calling at the port. At the same time, it is generally expected that the anticipation of sufficient freight volume is key for an alliance to decide to establish a direct link to a port. This conundrum illustrates the difficulty in determining whether the increase in volumes observed at the port was caused by the direct link operated by the alliance, or whether the operation of a direct link by the alliance was caused by the expected increase in volumes shipped to the port.¹¹⁰

¹¹⁰ The choice of specific ports of call and corresponding increase in port throughput may also be driven by the expansion of carriers in the port or terminal operations, as illustrated during the evaluation

The second study focuses on the 2020-2022 period and aims at demonstrating that the deterioration in the provision of liner shipping services during the COVID-19 crisis was the result of changes in exogenous factors (increased bunker costs, increased demand, reduced capacity relative to demand, increased number of COVID-19 cases) and were not caused by the presence of consortia which, if anything, helped to alleviate it.

After an assessment of the data used in the second study, it appears that none of the tested variables shows a clear relationship with the evolution of freight rates over the 2020-2022 period, especially the difference in evolution of rates across different trades. In any case, the non-stationarity of freight rates over the period covered by the study,¹¹¹ i.e. the fact that rates show no clear tendency to revert to a stable level, largely invalidates the econometric analysis.

In view of the above-described limitations, no econometric assessment will be determinative on its own for the purpose of deciding on whether consortia, let alone exempted consortia, continued to be consumer-welfare enhancing during the evaluation period.

Preliminary comments on vessel size and capacity utilisation

The CBER is grounded on two basic premises: through the pooling of volumes from different carriers, consortia bring efficiencies by (i) enabling the use of larger vessels, and (ii) improving the utilisation of available capacity. In doing so, it improves the asset efficiency and cost competitiveness of carriers, which is key for their viability especially during market downturns.

The demonstration of those two premises, i.e. consortia lead to larger vessels and higher utilisation rates, is fraught with difficulty, due to the difficulty in disentangling the causes and effects given the various dynamics present in the liner shipping sector.

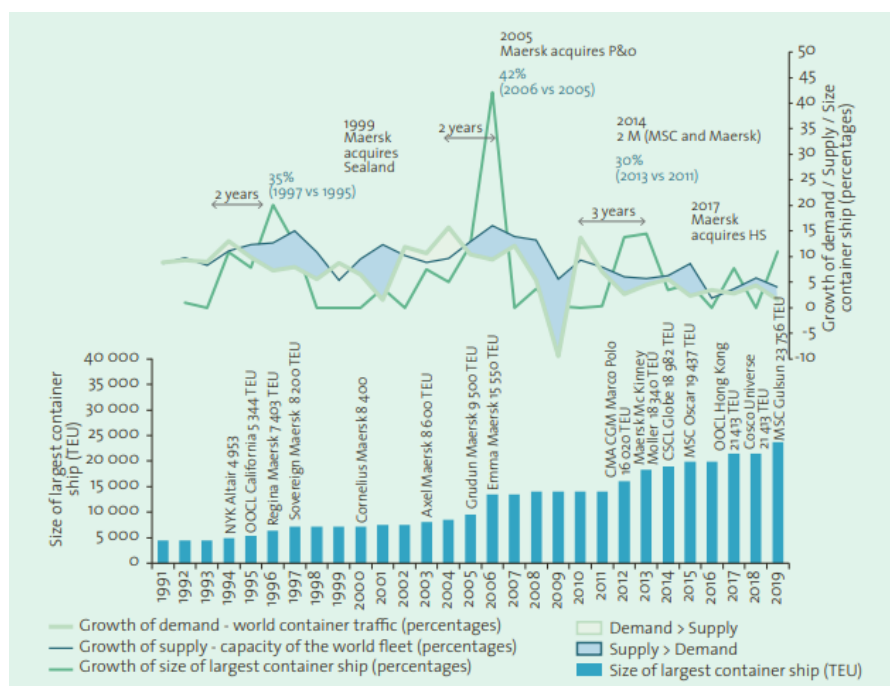
First, there are a number of factors that may influence the growth trend in ship size, and there is no clear evidence that the orders for larger vessels have been linked to the planned or actual membership in consortia. As illustrated below (Figure 10), in the past, the main spikes in ship size generally occurred two years after demand exceeded supply, which may suggest that individual carriers decided to order new, larger vessels around the peak of demand, regardless of whether they operated in consortia or on a stand-alone basis. However, the data show that this rule no longer held true at a given point, suggesting that there are other factors influencing the trend.¹¹²

period by the new or additional direct services operated by MSC to Pointe Noire or Hapag-Lloyd to Wilhelmshaven.

¹¹¹ The study is based on data covering the period from January 2017 to September 2022. It, therefore, captures only part of freight rate decrease, which extended until 2023.

¹¹² “Ongoing challenges to ports: the increasing size of container ships”, Economic Commission for Latin America and the Caribbean (CEPAL), FAL Bulletin 379, 2020

Figure 10 – Increases in vessel size in relation to changes in fleet supply and demand, 1991–2019



Source: CEPAL, *FAL Bulletin 379*, 2020, on the basis of M. Gómez Paz, Clarkson Research, *Alphaliner and Barry Rogliano Sales*

In that context, it may be argued that the individual carriers’ quest for scale, which led to an ever increasing size of vessels, was the driving force behind the consolidation of the liner shipping industry (including through alliances) and the overall fleet expansion, often in excess of trade growth. In other terms, while in theory consortia contribute to the operation of larger vessels, there are indications that carriers choose to invest individually in larger vessels before partnering with other carriers, if necessary to make those investments profitable. The example of HMM, the only carrier having become a full member of an alliance during the evaluation period (THE Alliance, starting April 2020 following the termination of a less integrated partnership with 2M), is also equivocal. HMM had ordered 12 ultra-large containerships of 23 000-TEU size in 2018, before joining THE Alliance. Nevertheless, it cannot be excluded that the new ship order was linked to plans to join an alliance. Furthermore, as indicated in the 2019 evaluation report, such ultra-large vessels are essentially used on the Europe-Asia trades by the alliances, which fall outside of the scope of the CBER, so that the link between the ordering of those vessels and the CBER cannot be established.¹¹³ Nevertheless, this

(https://repositorio.cepal.org/bitstream/handle/11362/46457/1/S2000485_en.pdf). It may notably be noted that, after the introduction of the Emma Maersk container ship in 2006, the increment in the size of new vessels is smaller than it was in the past. This seems consistent with the argument presented during the consultation activities, according to which economies of scale become exhausted past a certain vessel size.

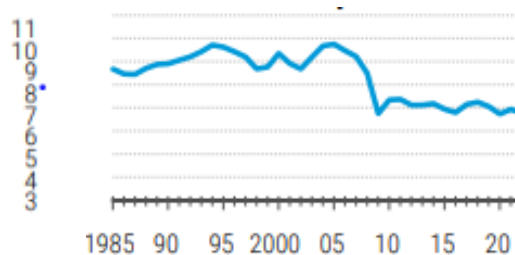
¹¹³ See 2019 evaluation report, p. 27.

conclusion does not have general application since the introduction of larger vessels on a trade may trigger fleet cascading effects, with the replaced ships being redirected to thinner trades where block-exempted consortia possibly operate.

In addition, while the prevailing opinion is that the operation of larger vessels leads to lower unit costs, some studies cast doubts on the continuous achievement of economies of scale, in particular taking account of the total cost of operations of shipping lines, ports, feeder operators and other stakeholders of the supply chain.¹¹⁴

Second, carriers have not submitted evidence of the actual effects of consortia on the capacity utilisation of their vessels. In fact, data from UNCTAD¹¹⁵ show that containership fleet productivity (i.e. the ratio between cargo carried and fleet capacity) has fallen since 2005 as growth in fleet capacity exceeded demand. Market consolidation in the 2010s reduced oversupply, which led to a relative stabilisation of productivity (see Figure 11). With containership capacity expected to grow by 7.9% in 2023, productivity is expected to resume its declining trend.¹¹⁶

Figure 11 – Operational productivity of the world containership fleet, cargo carried per fleet capacity (ton/dwt)



Source: UNCTAD, *Review of Maritime Transport 2022*

In light of the above shortcomings in the evidence adduced by the consortia in support of the alleged efficiencies, the assessment of the relevance of the CBER will hereafter focus on two other conditions of Article 101(3) TFEU, namely whether consortia generate consumer benefits and are indispensable to the achievement of their objectives.

Effect of consortia on freight rates

The views of carriers on the impact of consortia on freight rates are mixed. Certain carriers claim that consortia lead to lower freight rates thanks to two mechanisms: (i)

¹¹⁴ See e.g. “Mega-Schiffe – Mega-Trugschluss?”, Ulrich Malchow, Internationales Verkehrswesen, May 2022, submitted in response to the call for evidence. See also “Optimal container ship size: a global cost minimization approach”, Feng Lian, Jiaru Jin, Zhongzhen Yang, *Maritime Policy & Management*, Volume 46, 2019 - Issue 7, containing a numerical analysis intended to show that the optimal size should be smaller than the current biggest container ships in service.

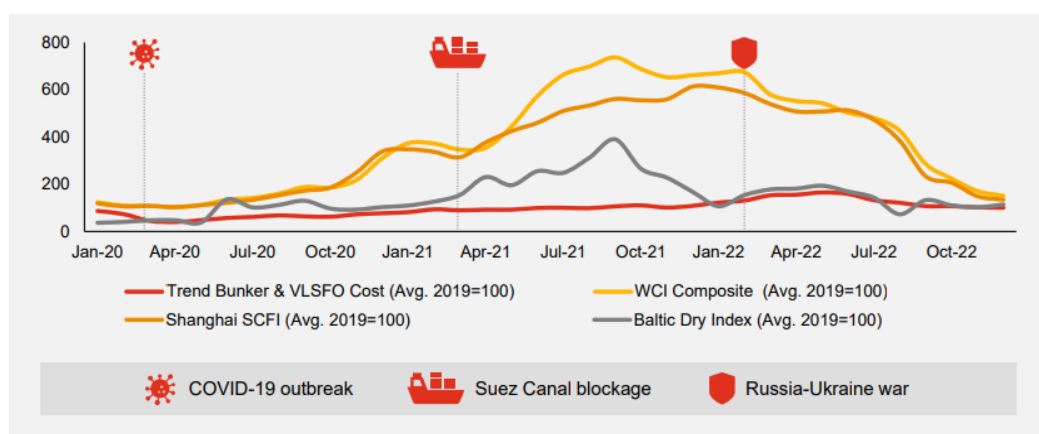
¹¹⁵ United Nation Conference on Trade and Development.

¹¹⁶ UNCTAD, *Review of Maritime Transport 2022*.

they contribute to lower horizontal differentiation between carriers, which reduces their market power and hence brings prices closer to costs; and (ii) they allow consortia members to operate more efficiently larger vessels, leading to lower unit cost which can be passed on to transport users in the form of lower prices. Others recall that consortia are pure operational arrangements that have a subordinate role in the determination of freight rates. The latter are rather subject to the commercial behaviour of the individual market players (carriers, shippers and freight forwarders).

The argument about the deflating effect of consortia on freight rates requires evidence that a fair share of the cost savings obtained through consortia is passed on to the consumers.¹¹⁷ In the 2019 evaluation report, the pass-on was supported by the parallel decrease of freight rates and unit costs incurred by carriers. This was notably illustrated by the parallel development of revenue per TEU, operating cost per TEU and bunker prices.¹¹⁸ Over the current evaluation period, the trends of freight rates and fuel prices were not correlated any more (see Figure 12).

Figure 12 – Global shipping freight rates compared to cost trend of bunker and very low sulphur fuel oils (VLSFO)



Source: pwc, *Transport and Logistics Barometer, 2022 full-year analysis*

Data published by Maersk and Hapag-Lloyd¹¹⁹ further illustrate that the evolution of freight costs and rates did not follow parallel paths during the evaluation period. In particular, Maersk indicates that in 2022, when prices peaked and sharply dropped, liner

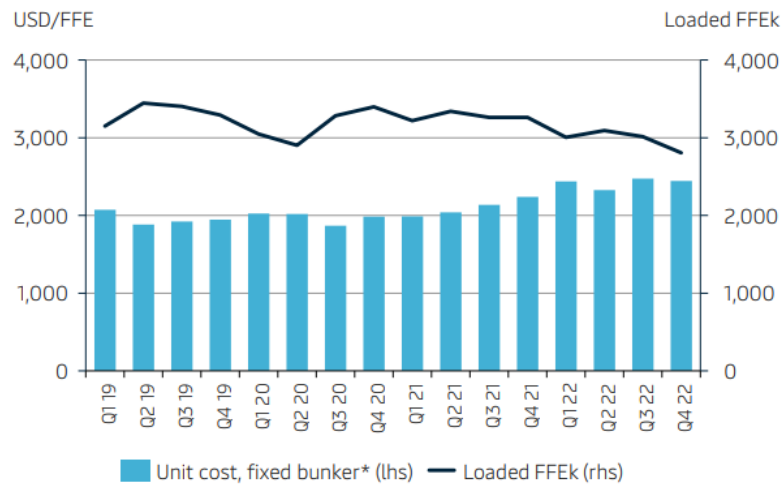
¹¹⁷ In this section, it is assumed – as is commonly accepted, at least up to a certain vessel size – that, everything else equal, larger vessels are associated with lower unit costs. For the purpose of the present evaluation, the assessment of whether consortia lead to consumer benefits therefore focuses on whether it can be concluded with sufficient degree of certainty that those lower unit costs translate into lower freight rates.

¹¹⁸ See 2019 evaluation report, Chart 7, p. 29.

¹¹⁹ Those two carriers have been chosen due to the financial transparency obligations to which they are subject. Their data is considered illustrative of the operating cost structure of container shipping lines.

shipping operating costs were essentially flat as lower container handling costs were offset by higher bunker costs (see Figure 13).

Figure 13 – Maersk – Operating cost of liner shipping – 2019-2022



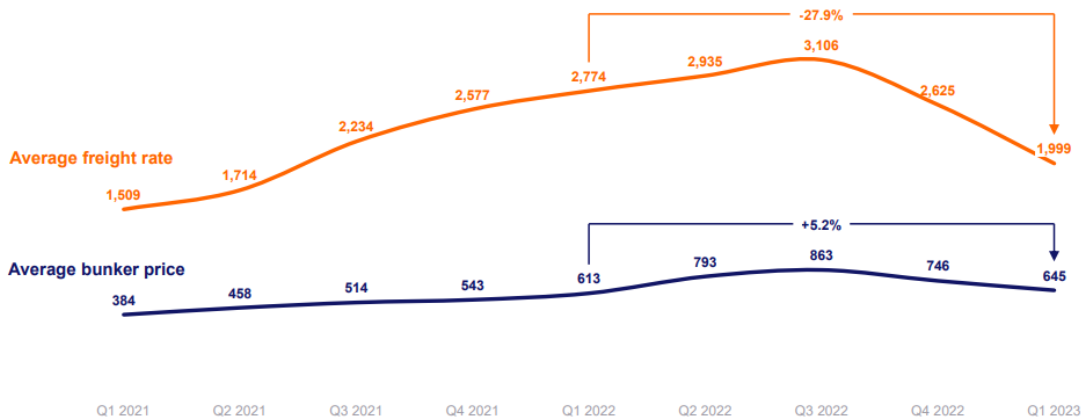
* Fixed bunker price of 450 USD/FFE

Source: Maersk - Full year and Q4 2022 results – Investor presentation – 8 February 2023

Hapag-Lloyd notes that, in Q1 2023, the average freight rates fell further amid lower demand and rapidly declining spot market rates, while bunker prices remained elevated (see Figure 14).

Figure 14 – Hapag-Lloyd – Freight rate vs. bunker price – Q1 2021-Q1 2023

FREIGHT RATE [USD/TEU] VS. BUNKER PRICE DEVELOPMENT [USD/MT]



Source: Hapag-Lloyd – Q1 2023 results – Investor presentation – 11 May 2023

In fact, empirical evidence suggests that the changes in freight rates over the evaluation period were due to COVID-related demand and supply shocks followed by the gradual return to overcapacity, rather than to how carriers organised their shipping services (i.e. provision of stand-alone or joint services). More specifically, the price hikes in 2020-2022 appeared driven by the combination of a surge in demand and a shortage in

effective capacity due to port and hinterland congestion. There is no strong indication, based on data submitted by carriers, that consortia had a softening effect on freight rates during that period. In 2022-2023, prices fell rapidly when demand slowed down and congestion unwound. There is no strong indication that consortia accelerated the trend towards the return of freight rates to pre-COVID levels or, conversely, enabled carriers to stabilise freight rates.

More generally, it appears difficult to identify with clarity the effect, if any, of consortia on freight rates during the evaluation period, be it during exceptionally stressed market conditions (2020-2022) or more usual supply-demand fundamentals (2022-2023). Furthermore, the evaluation period has confirmed both the inelasticity of demand for liner shipping services and the limited elasticity of supply, which are factors to be taken into account when assessing the extent to which cost efficiencies are likely to be passed on to consumers.¹²⁰

Effect of consortia on availability of services

Carriers submit that consortia allow their members to share bigger and more cost-efficient vessels, so that carriers are able to jointly offer more services and a better port coverage than on a stand-alone basis. They note in particular that on low volume trades (e.g. North-South trades), consortia allow more frequent services than independent lines. Transport users had in the past recognised that efficiencies achieved by consortia were passed on to them in the form of global coverage of the services offered.

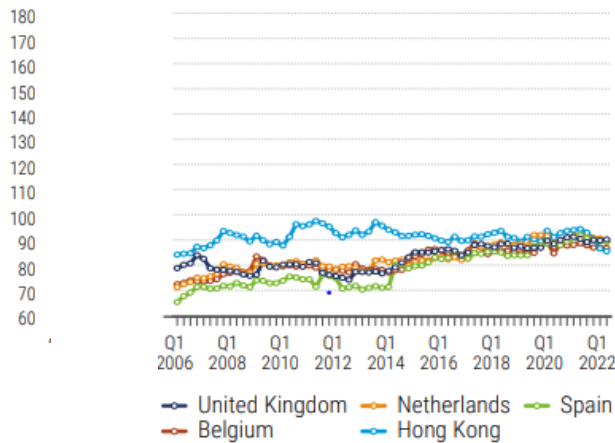
To illustrate that consortia contributed to higher port coverage over the evaluation period, the World Shipping Council relies on the evolution of UNCTAD's Liner Shipping Connectivity Index ("LSCI")¹²¹ for six EU countries (Belgium, France, Germany, Italy, the Netherlands and Spain), which would show that the integration of European countries in international shipping networks continues to improve over time, implying that consortia, which remain prevalent, contribute to such improvement. Yet, the data from the UNCTAD show a more nuanced picture, especially comparing EU connectivity with China or US connectivity. The connectivity in the most connected EU countries (the Netherlands, Spain and Belgium) came under pressure during the evaluation period (see Figure 15), as carriers, including those active in consortia, redeployed vessels to the China-USA trade to the detriment of EU trades, with the exception of Spain.¹²²

¹²⁰ See Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97), point 96.

¹²¹ The LSCI is computed based on of six components, relating to (i) the number of ship calls; (ii) the capacity deployed; (iii) the number of regular services; (iv) the number of carriers offering services in the country; (v) the size of the largest vessel calling at a port of the country; and (vi) the number of different countries directly connected to the relevant country. This index is set to 100 for the maximum score obtained in Q1 2006, namely that of China.

¹²² Although Spain increased capacity, it lost operators resulting in a decline in overall connectivity.

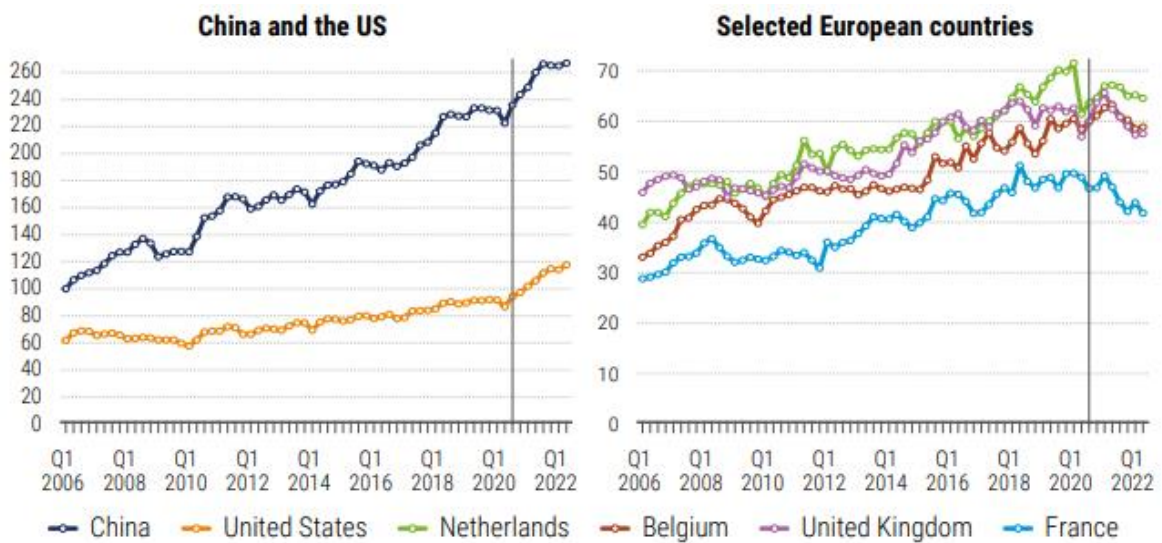
Figure 15 – Liner shipping connectivity index, top 6-10 economies, Q1 2006-Q2 2022



Source: UNCTAD, Review of Maritime Transport 2022

The same shift affected France (see Figure 16).

Figure 16 – Deployed capacity of container ships, selected economies, Q1 2006-Q2 2022



Source: UNCTAD, Review of Maritime Transport 2022

More generally, the trend noted in the 2019 evaluation report towards a decrease in the number of services offered by carriers continued over the evaluation period. This overall decline is mainly attributable, during the evaluation period, to the loss of shipping

services in thinly connected country pairs, while shipping services have been strengthened for core trading country pairs.¹²³

According to the UNCTAD, the overall decrease in the number of liner shipping services is partly attributable to the consolidation of liner shipping companies and the use of larger container ships.¹²⁴ Such a finding raises the question of whether consortia lead to a higher number of services and a denser network of port pairs. The progressive consolidation of the liner shipping industry, which had already been noted in the 2019 evaluation report, has led to the emergence of leading EU carriers which have sufficient scale on their own, as illustrated by the statement by Maersk's representative at the time of announcement of the dissolution of the 2M alliance with MSC.¹²⁵ Beyond the specific case of the 2M alliance, the evaluation period has been characterised by the implementation, by certain carriers, of strategies of deployment of capacity on a stand-alone basis, not limited to times of surging demand.¹²⁶ Those strategies include, but are not limited to, the replacement of consortia services by standalone services by a carrier which already provided most of the capacity.¹²⁷ Finally, not only large carriers, but also smaller carriers, call into question the continued necessity of consortia, to the extent that the latter refer to the possibility of less integrated forms of cooperation, in particular slot charter agreements, to improve their port coverage in response to customers' specific requirements. Overall, anecdotal evidence on the operational choices made by carriers over 2020-2023 casts doubts about the systematic indispensability of consortia to the achievement of the objectives of the CBER.

¹²³ UNCTAD, Review of Maritime Transport 2022.

¹²⁴ UNCTAD, Review of Maritime Transport 2022.

¹²⁵ "Maersk expects to be able to deliver ocean shipping at the same scale when the partnership with MSC ends without rising the cost of moving each container at sea, [Maersk's head of ocean shipping Johan] Sigsgaard said" (Reuters, "Top container shippers Maersk, MSC to end alliance from 2025", 25 January 2023).

¹²⁶ See "Changing lanes: Growing independence as alliances evolve", MDS Transmodal, 4 May 2023 (<https://www.mdst.co.uk/changing-lanes-growing-independence-as-alliances-evolve>).

¹²⁷ See for example "HMM takes over transpacific loop abandoned by THE Alliance", The Loadstar, 12 April 2023 (<https://theloadstar.com/hmm-takes-over-transpacific-loop-abandoned-by-the-alliance/>), which may give some insight as to the underlying economic reasons for the start of standalone services. According to this article, "HMM is looking to gain global market share – evidenced by its 8% increase in liftings in the final quarter of 2022, while its peers reported declining volumes during the period. The eighth-ranked carrier also has a significant orderbook, equivalent to a third of its current fleet capacity of some 810,000 teu, so, notwithstanding its THEA partnership, HMM could be looking at further slot charter agreements with other carriers, or more standalone services in order to utilise this capacity."

Effect of consortia on quality of services

The prevalent view among carriers¹²⁸ is that the key consumer benefits of consortia generally include the ability to guarantee fixed days of sailings over a fixed period and to provide more frequent and reliable services, resulting in improvements in the quality of the supply chain from the manufacturer to the ultimate consumer in today's "just in time" environment.

During the COVID-19 crisis, port and hinterland congestion emerged in major ports around the world and impacted the productivity of carriers, causing delays which in turn contributed to the worsening and spreading of supply chain disruptions globally, including in the EU. Although the situation is improving, global schedule reliability and delays have not stabilised yet. It remains thus difficult to assess the effect of consortia on the quality of services over the evaluation period.

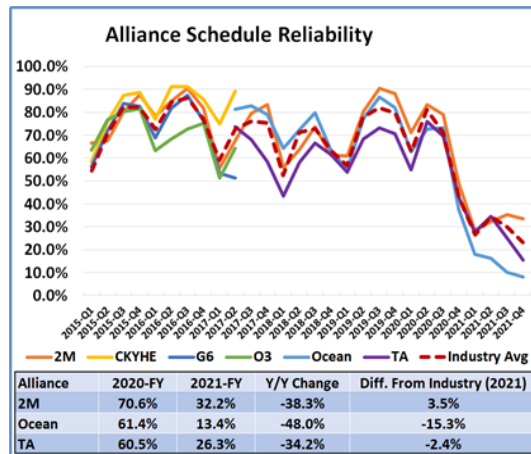
Nevertheless, qualitative responses from carriers and freight forwarders tend to indicate that the reliability of services depends more on the specific market conditions and the choices of capacity deployment made by carriers (e.g. blanked sailings, arbitrage between skipped port calls and delays) than on the shipping system adopted by them. In particular, they point towards the adoption of comparable strategies by carriers, regardless of whether they operate within or out of a consortium, to cope with fluctuations in demand (capacity adjustments through notably blanked sailings or slow steaming) and to restore schedules impacted by unforeseen circumstances (e.g. geopolitical issues, weather events, strikes). By exception, carriers operating independently (including members of consortia deploying capacity outside of the consortia on given trades) appear more likely to introduce shuttle services or services with a faster transit time serving a limited number of ports (e.g. pairs of hub ports), which face lower reliability risks. Nevertheless, the specific features of such services, including the relatively low available capacity, call into question their comparability with services offered by consortia.

As an illustration of the difficulty to conclude on the effect of consortia on service quality, a comparison of the schedule reliability of the global alliances with the average industry performance over the 2015-2021 period does not show any robust trend, by which one or several alliances would consistently outperform their peers (see Figure 17).¹²⁹

¹²⁸ Carriers that define themselves as independent (not relying on consortia to any significant extent) consider that consortia have no positive effect on the quality of services.

¹²⁹ It may be noted that the performance of niche carriers on intercontinental trades (e.g. ICL or Marfret) tends to be better than the performance of alliances. Nevertheless, the much smaller number of services and port calls offered by niche carriers renders their performance more volatile and may call into question the robustness of such a comparison.

Figure 17 – Alliance schedule reliability



Source: Sea-Intelligence, Global Liner Performance report – 2021 Full Year

Environmental impact of consortia

Carriers generally¹³⁰ submit that consortia bring environmental efficiencies in the form of reduced greenhouse gas emissions since (i) they enable the use of larger vessels which use less fuel per available unit (translating into lower emissions of CO₂, SO₂ and NO_x than smaller vessels per available unit), and (ii) they improve the likelihood of filling up those large vessels, thus translating into lower emissions per carried unit.

As a preliminary comment, it appears that there is no clear consensus as to the correlation between vessel size and fuel efficiency and lower emissions of the whole maritime supply chain. A study submitted in response to the call for evidence notably aims to show that the effect is reversed above a certain vessel size, i.e. above a certain size, fuel use (and thus emissions) per available unit increases again.¹³¹ This would be due to the longer berth times of large vessels, which would need to be compensated by increasing speed at sea leading to increased fuel consumption and CO₂ emissions at sea. It is notable that the study does not include any assumptions covering the possible effects of large vessels on the consolidation of volumes amongst few hub ports or on the increased usage of other (more polluting) transport modes, such as road and short-sea, due to volumes being loaded or unloaded further away from their point of origin or destination.

In any case, considering that the four conditions of Article 101(3) TFEU (efficiency gains, pass-on to consumers, indispensability of the restrictions, and no elimination of competition) are cumulative, it appears unnecessary to further assess the environmental efficiencies brought by consortia (first condition) and more appropriate to focus on the

¹³⁰ A specialist carrier expresses a diverging view, stating that it has not seen any tangible difference in the environmental impact or energy efficiency between independent carriers and consortia members during the evaluation period. According to this carrier, various individual carriers have taken steps to address those matters but no pattern has emerged.

¹³¹ “Mega-Schiffe – Mega-Trugschluss?“, Ulrich Malchow, Internationales Verkehrswesen, May 2022.

third condition (indispensability) and, to a lesser extent, the second condition (pass-on to consumers).¹³²

Regarding the condition of Article 101(3) TFEU on indispensability, carriers have not submitted evidence of the causal link between consortia and investment in fuel efficient or green vessels. On the contrary, they generally submit that their investments are guided by environmental regulations and economic considerations, without taking account of their partners' decarbonisation strategies or technological choices. In terms of regulations, carriers specifically refer to the EU Green Deal, which sets an objective of climate neutrality by 2050 and reduction of net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. To achieve this target, carriers note the mandatory measures under two key EU initiatives, i.e. FuelEU Maritime,¹³³ which sets maximum limits on the yearly greenhouse gas intensity of the energy used by a ship and the EU ETS,¹³⁴ which puts a price on CO₂ and lowers the permitted level of emissions every year. Carriers also refer to initiatives at international level by the International Maritime Organisation ("IMO"), which, in its initial 2018 strategy, had set a target of reducing carbon intensity¹³⁵ of international shipping by at least 40% by 2030 compared to 2008, pursuing a 70% reduction by 2050 and reducing the total annual greenhouse gas emissions by at least 50% by 2050 compared to 2008. To reach this goal, the IMO has adopted the Energy Efficiency Existing Ship Index ("EEXI"), a framework for determining the efficiency of the design of large in-service vessels, and the Carbon Intensity Indicator ("CII"), an operational measure of how efficiently a ship transports goods or passengers measured, in essence, in grams of CO₂ emitted by cargo-carrying capacity and nautical mile. On 7 July 2023, the IMO reached an agreement to revise its 2018 strategy on reducing greenhouse gas emissions from ships. The revised 2023 strategy sets a goal of net zero emissions from ships *"by or around, i.e. close to, 2050"*, compared to a 50% reduction in the same time horizon according to the initial 2018 strategy.

In that respect, the World Shipping Council stated at the time of the preliminary agreement between the European Parliament, Council and Commission on the maritime elements of the EU ETS, that it hoped that *"the EU ETS for maritime will help drive investment in renewable energy as well as in the supply networks needed for the alternative maritime fuels necessary to make the transition."* The World Shipping Council added that *"[g]lobal regulation – an international price on carbon emissions*

¹³² See paragraphs 38 and 39 of the Article 101(3) Guidelines.

¹³³ See press release of 23 March 2023, "European Green Deal: Agreement reached on cutting maritime transport emissions by promoting sustainable fuels for shipping" (https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1813).

¹³⁴ See footnote 60 above.

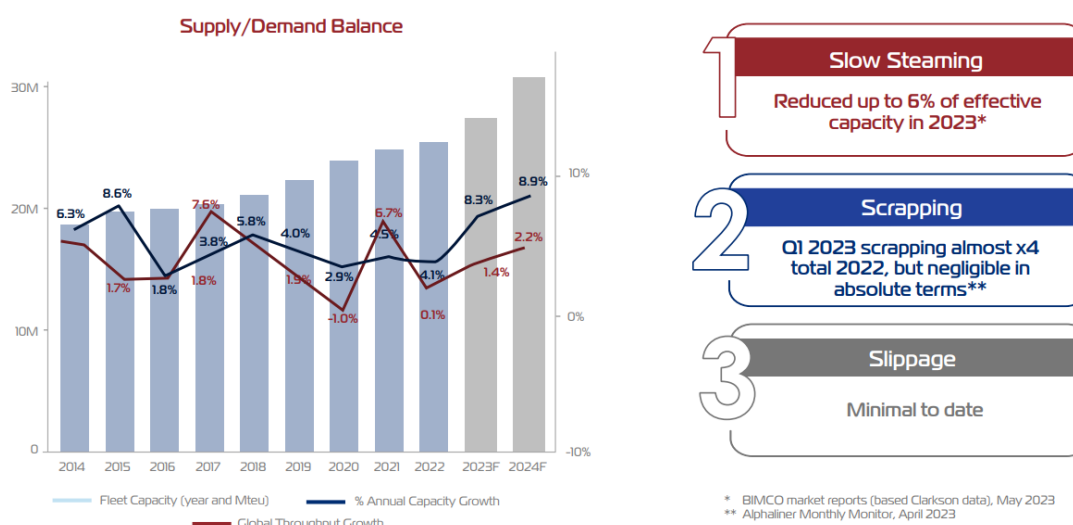
¹³⁵ Carbon intensity links the greenhouse gas emissions to the amount of cargo carried over distance travelled.

from shipping together with other measures to drive the supply of green energy and fuels – is the fastest and most efficient route to decarbonising shipping as a whole.”¹³⁶

In addition, the choice of operational parameters that have an impact on fuel efficiency of liner shipping services, notably sailing speed,¹³⁷ appears primarily driven by short-term market conditions, such as the demand-supply balance (see Figure 18a on the market update provided by ZIM in May 2023), the freight rates or the bunker costs (see Figures 18b, 18c and 18d), rather than consortia membership or even vessel size.

Figure 18a – Market update – Supply/Demand Balance – 2014-2024e

Oversupply in 2023 & 2024 Expected; Potential Mitigating Factors: Only Slow Steaming Meaningful To Date

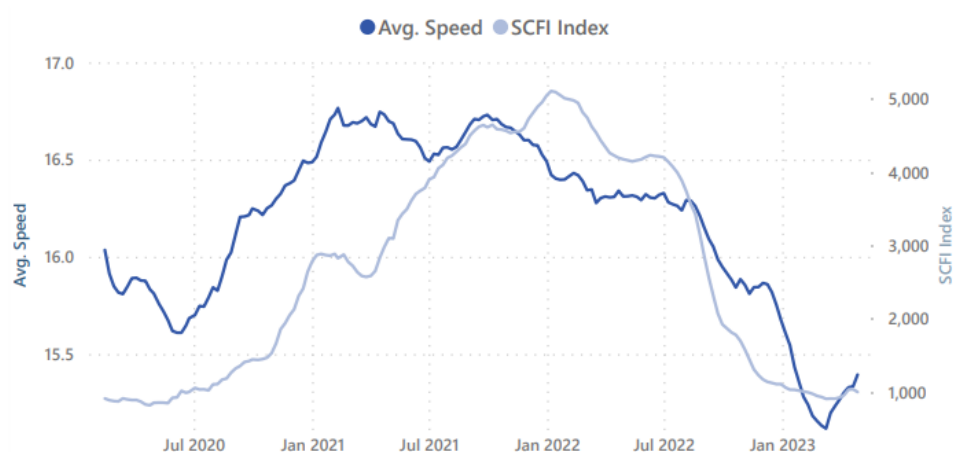


Source: ZIM – Q1 2023 results – Investor presentation – 22 May 2023, based on Alphaliner Monthly Monitor, April 2023

¹³⁶ “Liner shipping is ready for the EU ETS Maritime”, World Shipping Council, 30 November 2022 (<https://www.worldshipping.org/news/liner-shipment-is-ready-for-the-eu-ets-maritime>).

¹³⁷ See e.g. “Ships get older and slower as emissions rules bite”, Reuters, 12 July 2022 (<https://www.reuters.com/business/sustainable-business/ships-get-older-slower-emissions-rules-bite-2022-07-11/>): “While older ships can be retrofitted with devices to lower emissions, analysts say the quickest fix is just to go slower, with a 10% drop in cruising speeds slashing fuel usage by almost 30%, according to marine sector lender Danish Ship Finance. At the moment, only about 5% of the world’s fleet can run on less-polluting alternatives to fuel oil, even though more than 40% of new ship orders will have that option, according to data from shipping analytics firm Clarksons Research.”

Figure 18b – Global Containership Fleet – Average speed vs. Freight rates – 2020-2023

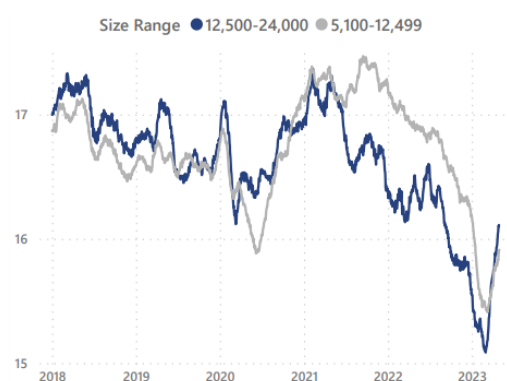


Source: Alphaliner, Monthly Monitor – May 2023

Figure 18c –Average speed vs. Bunker price – 2020-2023



Figure 18d –Average speed vs. Ship size – 2020-2023



Source: Alphaliner, Monthly Monitor – May 2023

Setting aside the question of the robustness of the evidence submitted by carriers, the latter’s environmental efficiency claims raise the question of their compliance with the conditions set out in Article 101(3) TFEU. The World Shipping Council claims that, to the extent the CBER acknowledges the efficiencies underlying the environmental benefits (i.e. consortia contribute to the more efficient use of larger vessels), it would be an undue burden to require carriers (i) to substantiate in objective, concrete and verifiable terms, the environmental efficiencies associated with consortia; or (ii) to demonstrate that there are no other economically practicable and less restrictive means of achieving the benefits associated with consortia.

It should be recalled that, in the context of the evaluation of the CBER, the Commission should be able to conclude with a sufficient degree of certainty as to the compliance of the claimed environmental efficiencies with all the conditions of Article 101(3) TFEU. The evidence collected appears insufficient to reach that conclusion.

In particular, as generally acknowledged by carriers, they are or will be subject to a number of mandatory measures to accelerate decarbonisation and reduce pollution, notably the emission's reduction measures enacted by the IMO as well as the EU ETS. In addition, carriers do not provide evidence that consortia are indispensable to decarbonise the sector or reduce pollution in a more cost efficient way.¹³⁸ Some of them (e.g. members of THE Alliance) claim that the initiatives taken at EU and international levels constitute strong regulatory hurdles for the lines, which their alliance (not a block-exempted consortium) helps to alleviate. Such a generic claim is insufficient to demonstrate that consortia are indispensable to achieve the goals pursued by measures made binding on carriers through EU and international rules.¹³⁹

Finally, regarding the condition of Article 101(3) TFEU on pass-on to consumers, the claimed environmental benefits are collective benefits that would only be taken into account as consumer benefits for the purposes of Article 101(3) TFEU if they accrue, for a substantial part, to transport users (EU shippers and freight forwarders).¹⁴⁰ In the absence of information provided by carriers,¹⁴¹ it is difficult to conclude as to whether this condition is fulfilled.

Conclusion on efficiencies and consumer benefits brought by consortia

In light of the above, it appears that the body of evidence collected for the purposes of the evaluation of the CBER is insufficient to conclude as to whether consortia brought consumer benefits over the 2020-2023 period. The studies presented to the Commission show that establishing a causal link between consortia and different variables capturing their potential benefits is very difficult in practice because of the continuous presence of consortia over time and across trades. Moreover, the factors determining freight rates or service reliability are numerous and interlocked, so that it has proved impossible to establish robust causal links between their changes over the evaluation period and consortia.

¹³⁸ Prior to the announcement of the dissolution of 2M in 2025, Maersk had for example already announced a standalone surcharge to cover the costs of compliance with the EU ETS.

¹³⁹ See new Horizontal Guidelines, paragraph 564.

¹⁴⁰ Section 9.4.3.3 of the new Horizontal Guidelines explains the conditions under which collective benefits would be taken into account under Article 101(3) TFEU (notably where the consumers in the relevant market substantially overlap with the beneficiaries or form part of them) and provides specific examples. It notably spells out that, in cases where collective benefits are dispersed among a large section of society, it is less likely that the overlap with the consumers in the relevant market will be substantial (footnote 409).

¹⁴¹ The World Shipping Council argues that the guidance on the condition related to the pass-on to consumers in the chapter on sustainability agreements in the draft new Horizontal Guidelines seems ill-suited to consortia as it focuses primarily on business-to-consumer sales. The argument seems to reflect a disagreement by the World Shipping Council on the principles defined in the guidance rather than a problem of applicability of the guidance to consortia.

4.3.2. Consortia's contribution to EU competitiveness and trade

During the evaluation period, the liner shipping sector witnessed an extreme example of up-cycle followed by a down-cycle, while the degree of concentration and horizontal cooperation between carriers remained relatively stable. The previous section focuses on whether, in those circumstances, there are sufficiently strong indications that consortia brought consumer benefits during both cycles, notably by mitigating the challenges faced by transport users during the 2020-2022 period. This section draws on those circumstances to assess the broader role of consortia in the productivity and competitiveness of liner shipping services, the functioning of the maritime supply chain, as well as the overall efficiency and resilience of the global logistics system.

First, at the time of its adoption, the justification for the CBER was underpinned by the specific features of the liner shipping sector, notably structural oversupply and poor financial returns. Cooperation of carriers in consortia facilitated by the CBER was meant to contribute to reducing the imbalance between supply and demand and improve the predictability of freight rates, so as to encourage investments in more efficient vessels (including recently in the greening of the worldwide fleet). The evolution of the fundamentals of the sector until mid-2020 appeared to validate this approach. As an example, the listing particulars¹⁴² published by CMA CGM in October 2020 stated the following: *“The structural industry changes of consolidation and alliances have contributed, we believe, to its ability to respond effectively to cyclical supply-demand changes by implementing measures such as idling and blank sailing, as well as nominal capacity adjustments through the variable use of charters. The historically low level of the industry’s order book as compared to the current fleet size also augurs well for continued positive supply to demand balance. The better management of this balance has been reflected by declining freight rate volatility in recent years and, most recently and significantly, by the 43% year-on-year increase in the Shanghai 180 Containerized Freight Index (“SCFI”) monthly average between August 2019 and August 2020, notwithstanding the COVID-19 pandemic’s depressing effect on demand.”*¹⁴³

However, despite the more consolidated state of the industry compared to the last down-cycle in 2015-2016 and the prominence of consortia on the main East-West trades, carriers seem to have failed to rationalise supply and stabilise freight rates after they reached a peak in early 2022. As during the prior cycle of the industry, a small number of large individual carriers continues to strive for scale and cost efficiencies, contributing to the return of overcapacity and lumpiness in profitability.

This forces mid-sized carriers to either merge or retreat in niches to maintain sustainable independent operations (see Figure 19). Such strategies in turn raise the question of whether cooperation promoted by the CBER, which was expected to lower the barriers to

¹⁴² Listing particulars contain detailed information about the securities and the issuing company.

¹⁴³ See <https://www.luxse.com/security/XS2242188261/313784>, p. 3.

entry on thick trades (e.g. East-West trades) for smaller carriers and facilitate the geographic diversification of their operations, does not ultimately act against the interests of those carriers.¹⁴⁴

Figure 19 – Average operating-profit margin of selected carriers

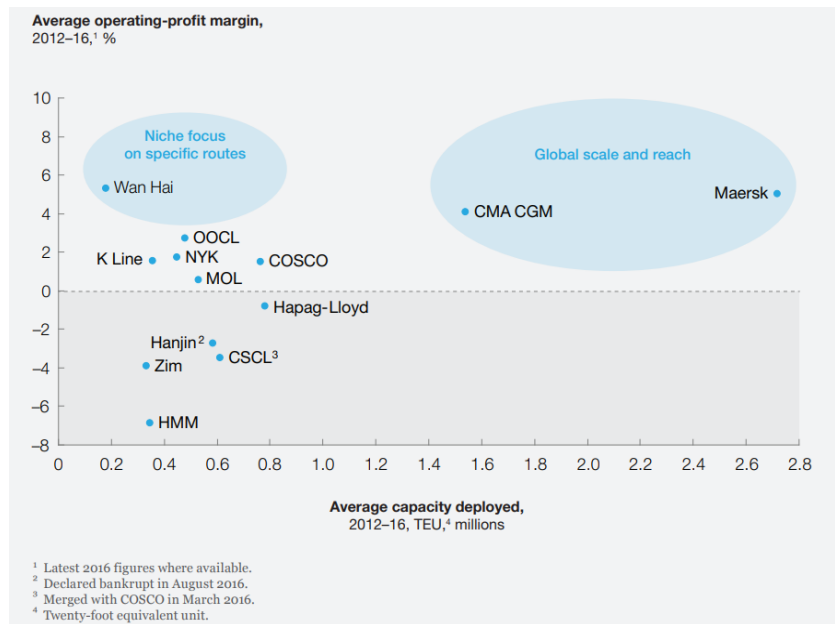


Exhibit from “How container shipping could reinvent itself for the digital age”, October 2017, McKinsey & Company, www.mckinsey.com. Copyright (c) 2023 McKinsey & Company. All rights reserved. Reprinted by permission.

Second, consortia reduce the scope for differentiation and contribute to the commoditisation of liner shipping services. This appears to have prevented carriers from investing in innovative operating models and possibly higher-priced (or premium) services with shorter transit times on a given trade, door-to-door integrated offerings or digital solutions adapted to customer needs. This may also have increased the vulnerability of certain categories of EU shippers and aggravated trade imbalances. An example is the shift of capacity in 2021 from Far East-Europe or Europe-North America to Far East-North America when the unit earnings on the latter trade skyrocketed, which may have pushed freight rates up on the two EU trades.¹⁴⁵ This affected not only EU importers, which faced increased freight rates, but also EU exporters. As an example, during the consultation activities, shippers have provided evidence of the difficulty to find available capacity on the backhaul leg of the Far East-Europe trades. On that leg, on

¹⁴⁴ In that respect, one carrier has specified that: “There is no question that the vessel economies of scale possible with a consortium will dwarf that on an individual line, but the benefits to the customer are short-term only during market downturns. (...). During a rate war in a down market, the better cost efficiencies of larger ships will enable them to outlast the smaller operator, but that only leads to less competition and fewer choices for the shipper.”

¹⁴⁵ See e.g. “Trans-Atlantic braces for rate hikes as capacity shifts elsewhere”, Journal of Commerce, 2 March 2021.

which structurally demand is far lower than supply¹⁴⁶, freight rates remained relatively stable throughout the evaluation period while rates on the headhaul leg soared, so that carriers found it commercially and financially rational to send empty containers back to Asia rather than to lose time marketing them in the EU.

Third, although it is difficult to measure the actual contribution of consortia, particularly block-exempted consortia, to the increasing size of vessels, the CBER is based on the premise that it will encourage the adoption of larger, more efficient vessels by carriers. Therefore, stakeholders generally perceive the CBER as one of the factors for the emergence of ultra-large vessels, which, according to port authorities, may have put a strain on port, terminal and hinterland operations and had negative external effects. While European hub ports appear to have invested in the infrastructure and equipment needed to accommodate the needs of the global alliances and a system of substitutable ports, such investments have not been carried out in other parts of the world, notably in the US. The 2021-2022 period has shown that the frailty of regional port and inland transport systems outside of the EU can have disruptive spill-over effects on the EU supply chain and render the efforts of carriers to adjust liner shipping capacity to demand void. More generally, the functioning of the sector during the evaluation period has revealed that the overall benefits of consortia may be limited by capacity constraints of complementary port and inland services. In that context, only a comprehensive regulatory and enforcement approach to the productivity of the maritime ecosystem as a whole, striking a balance between the needs for cooperation and competition between stakeholders along the supply chain, appears capable of delivering the benefits expected from the CBER.

In light of the above, it appears that the needs of EU shippers and carriers have shifted away from the pursuit of scale and cost efficiency, which calls into question the relevance of the CBER for the development of the EU liner shipping industry and EU trade.

5. WHAT ARE THE CONCLUSIONS AND LESSONS LEARNED?

5.1. Conclusions

The competitive structure of the liner shipping industry has changed significantly since the CBER was first adopted in 2009. It has shifted from a fragmented sector with numerous regional carriers and players along the supply chain to a more consolidated sector shaped by a few global, integrated players which cooperated in alliances during the evaluation period.

¹⁴⁶ The capacity deployed on a trade is determined by the demand on its headhaul (or dominant) leg, i.e. from Far East to Europe on the Far East-Europe trades.

Those structural changes have not only reduced the number of small and medium-sized carriers that could benefit from the CBER but also called into question the appropriateness of a dedicated block exemption for the sector. While those changes certainly pre-dated the evaluation period, their full impact on the functioning of the global supply chain could only be measured over the last three years, when the stressed market conditions triggered chain reactions and exposed the weaknesses of the EU trade system.

Those weaknesses cannot and should not be attributed to block-exempted consortia. This, however, should neither detract from the opposition to the CBER expressed by the transport users and port operators, nor hamper an objective, comprehensive and evidence-based evaluation of the CBER.

The evidence collected from carriers points towards the – at best limited – effectiveness and efficiency of the CBER during the evaluation period. Indeed, both the small number of unique consortia falling within the scope of the CBER in 2020 (13 out of 43) and the profile of these consortia (always involving one of the top-five carriers which was also a member of a non-exempted consortium on the same trade) tend to show that the CBER brought limited compliance cost savings to carriers and was no longer serving its objective. This objective was to facilitate the creation and operation of pro-competitive consortia, in particular between small- and medium-sized carriers. In addition, carriers submit that the key terms of the CBER are clear, unambiguous and accessible to all carriers, in particular small ones. However, their feedback tends to show diverging interpretations of the CBER, even among large carriers with proven antitrust experience and compliance resources. Finally, carriers confirm that the decision to enter into a consortium is guided by commercial needs and that antitrust rules play – at most – a subordinate role.

In addition, stakeholders other than carriers generally call for strengthened supervision of the sector rather than administrative simplification, which calls into question the added value of a dedicated block exemption regulation at EU level. Furthermore, putting an end to sector-specific rules and bringing the liner shipping sector under the general Article 101 regime would allow stakeholders to benefit from the Commission's efforts of clarification put into both the new Specialisation Block Exemption Regulation and the new Guidelines on horizontal cooperation agreements.

The question of the relevance of the CBER requires an assessment of whether (i) it can still be concluded with a sufficient degree of certainty that consortia which meet the conditions of the CBER generally fulfil the conditions of Article 101(3) TFEU; and (ii) cooperation between carriers continues to help both to improve the competitiveness of the EU liner shipping industry and to develop EU trade, as expected under the Enabling Regulation.

With regard to the first part of the assessment, the evidence submitted by carriers to support the claimed efficiencies is inconclusive, due in particular to the impossibility of overcoming certain methodological limitations. These limitations make it difficult to

establish causal links between consortia and consumer benefits. The limitations include an absence of counterfactuals, the interdependence of the possible causes of benefits under examination, and the volatility of freight rates. Market developments in the sector during the evaluation period tend to confirm both the inelasticity of demand for liner shipping services and the limited elasticity of supply. In combination, these two factors reduce the likelihood that any cost efficiencies achieved by carriers would be passed on to transport users. Moreover, it is difficult to consider that consortia are indispensable within the meaning of Article 101(3) TFEU to achieve environmental efficiencies, since the sector is subject to binding international and EU measures to reduce greenhouse emissions and pollution.

With regard to the second part of the assessment, the disruptions faced by the different players in the EU supply chain and shippers during the COVID-19 pandemic show the limits of an antitrust tool. This is because the CBER has helped to commoditise liner shipping services, while the ability of shippers to reap the benefits of carriers' increasing scale and reach is limited by the capacity constraints of the other players in the supply chain (e.g., port and land operators). More structurally, while transport users acknowledge that consortia have enabled and supported the required investment to operate intercontinental services at a lower unit cost and faster transit time, they warn that consortia now appear to contribute to a market where the cost of entry has become prohibitive and where service differentiation has disappeared at the expense of shippers. In addition, the decline in direct connectivity (i.e. number of country pairs that can be reached without transshipment) that had started before the COVID-19 crisis continued over the evaluation period, whereas it has been empirically shown that direct regular shipping connections help to reduce trade costs and increase trade volumes.

Overall, the CBER does not appear to be fit for its purpose any more, as it does not fulfil the criteria of effectiveness, efficiency and EU added value. This conclusion is based on both: (i) the information submitted by stakeholders in respect of the 2020-2023 period; and (ii) other evidence collected in the course of the evaluation in relation to the functioning of the container shipping sector and the contribution of consortia to the competitiveness of this sector. The evidence collected during the evaluation process is inconclusive as to the continued relevance and coherence of the CBER.

5.2. Lessons learned

The COVID-19 pandemic experience has shown the need to enhance the resilience of EU supply chains. In markets that are heavily intertwined, responding to this need requires common shared actions on the sea side and the land side.¹⁴⁷ Maintaining an exceptional antitrust regime for shipping lines at EU level appears to have given rise to rifts between

¹⁴⁷ See e.g. speech delivered by Commission Dalli on behalf of Commissioner Vălean at the plenary debate of the European Parliament on international ports' congestions and increased transport costs affecting the EU, 25 November 2021.

the different categories of stakeholders, to the detriment of arrangements and structures which would better accommodate the interests of all.

On the one hand, carriers have generally claimed that the expiry of the CBER would send the signal that alliances do not bring consumer benefits anymore, while those alliances have contributed to maintaining international trade flows throughout the COVID-19 pandemic.

On the other hand, certain shippers have, at the height of the COVID-19 crisis, called for the immediate repeal of the CBER. The CBER has also been a source of dissatisfaction on the part of the other players of the value chain, notably freight forwarders and port operators, which compete directly with vertically-integrated carriers. The CBER has notably created the impression that they were treated unfairly and that there was no real level playing field in the maritime sector.

Overall, it appears that the restoration of trust between stakeholders necessary to build a resilient, integrated and efficient supply chain requires ensuring that the liner shipping sector is not perceived as being subject to looser scrutiny from antitrust enforcers than other industries.

1. Lead DG, Decide reference

Commission Directorate-General for Competition (DG Competition), Decide reference: PLAN/2022/1127.

2. Organisation and timing

In July 2022, the Commission services launched the evaluation of the Consortia Block Exemption Regulation (“CBER”). Its purpose is to assess how the CBER, due to expire on 25 April 2024, has functioned since it was last extended in 2020.

The Inter-Service Steering Group (ISSG) was set up. It first met on 20 July 2022 with representatives from the Commission’s Secretariat General, Legal Service and following Directorates-General: MOVE, CLIMA, GROW, MARE, TRADE, and DEFIS. During its first meeting, the ISSG was consulted on the consultation strategy.

The second ISSG meeting was held on 16 December 2022 with representatives from the Commission’s Secretariat General, Legal Service and following Directorates-General: MOVE, CLIMA, ENV, GROW and TRADE. It discussed the feedback received during the consultation activities, as well as the report from a firm of transport economists on the functioning of consortia in the period 2020-2022, commissioned by DG Competition.

The third ISSG meeting was held on 15 March 2023 with representatives from the Commission’s Secretariat General, Legal Service and following Directorates-General: MOVE, CLIMA, ENV, GROW, TRADE and MARE. It discussed a draft version of an outline of the preliminary findings from the evaluation of the CBER.

A Call for Evidence was open from 9 August 2022 to 3 October 2022 on the *Have your say* portal.¹⁴⁸ DG Competition also sent targeted consultations in the form of online questionnaires (eQuestionnaires) addressed to the main stakeholders to complement information gathered from responses to the call for evidence and obtain, in particular, specific quantitative evidence.

Agenda planning – timing

Date	Description
July 2022	Publication of initiation and planning
20 July 2022	1 st ISSG meeting

¹⁴⁸ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation_en

9 August 2022	Call for evidence Targeted questionnaires
16 December 2022	2 nd ISSG meeting
15 March 2023	3 rd ISSG meeting
2022 – 2023	Meetings with various stakeholders

3. Exceptions to the Better Regulation Guidelines

No exceptions were made to the Better Regulation Guidelines¹⁴⁹ during this Evaluation.

4. Consultation of the RSB (if applicable)

N/A.

5. Evidence, sources and quality

The primary source of evidence was the data and information gathered from citizens, businesses, public authorities and other relevant stakeholders who submitted feedback to the call for evidence, as well as the responses from carriers, transport users (shippers and freight forwarders) and port or terminal operators to the targeted questionnaires.

Several meetings were held between the Commission services and various stakeholders: the national competition authorities of EU/EEA States; the relevant ministries and authorities in EU/EEA States; BEUC (Bureau européen des unions des consommateurs), the umbrella organisation for EU consumer groups; the World Shipping Council and four of the carriers it represents; a public body representing French agricultural exporters.

Other data were obtained through the general sectoral monitoring activities of the Commission services, regular exchanges with market participants as well as competition and regulatory authorities in Europe, the US and other jurisdictions. The Commission services further asked a firm of transport economists to collect data and draw up a report on the functioning of consortia during the 2020-2022 period. The Commission services also used several publicly available reports and databases, such as from UNCTAD, OECD, HSBC and industry-journals.

¹⁴⁹ https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en

The evaluation is based on a wide range of data sources and inputs and involved both internal analyses by the Commission services as well as a report and a data analysis by an external provider. As regards their own analysis, the Commission services used also their sector knowledge and the experience gathered from the previous CBER evaluations and their continuous monitoring of the sector, in addition to the results of the consultation activities (call for evidence, targeted questionnaires and meetings).

1. Data sources

1.1. Consultation activities

1.1.1. Initiation of the evaluation process

The evaluation process of the CBER was initiated and its planning published on the Commission's central webpage *Have your say*¹⁵⁰ in July 2022.

1.1.2. The call for evidence

The call for evidence on the evaluation of the CBER was open for feedback between 9 August 2022 and 3 October 2022. Its objective was to obtain the views of citizens, businesses, public authorities and other relevant stakeholders on the effectiveness, efficiency, coherence, relevance and EU added value of the CBER. Participants were able to reply in any of the EU's official languages. The call for evidence was also promoted through a press release and DG Competition's website on competition policy.

1.1.3. The targeted questionnaires

From 9 August 2022 to 2 December 2022, stakeholders submitted their views on the performance of the CBER since 2020 in response to targeted questionnaires sent to carriers, transport users (shippers and freight forwarders) and port or terminal operators. Carriers and their representatives also submitted two econometric studies in support of their claims.

The factual summary of the answers is available in Annex V.

1.1.4. Meetings

Various bilateral meetings were held with stakeholders: Three meetings were organised with respectively the national competition authorities of the EU/EEA States, the relevant ministries in the EU/EEA States, and BEUC, the umbrella organisation for EU consumer groups. Two meetings were organised, upon their request, with the World Shipping

¹⁵⁰ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation_en

Council and four of the carriers it represents as well as with a public body representing French agricultural exporters.

1.2. Other data sources

The feedback collected by the Commission services through the call for evidence, the targeted questionnaires and the meetings complements the evidence they have collected as part of their general sectoral monitoring activities. Since the last extension of the CBER in 2020, the Commission services have had regular exchanges with market participants, such as shippers, freight forwarders and carriers, as well as with competition and regulatory authorities in Europe, the US and other jurisdictions on the challenges faced by the shipping sector. In December 2021, as part of their sectoral monitoring activities, the Commission services also started a fact-finding exercise by sending questionnaires to carriers active on trades to and from the EU to collect market information, in particular on the effects of the coronavirus pandemic on their operations and on the maritime supply chain.

The Commission services have used several other publicly available reports and databases as well, such as from UNCTAD, OECD, HSBC and industry-journals.

Finally, the Commission services have asked a firm of transport economists (MDS Transmodal) to collect data on the functioning of consortia during the 2020-2022 period and to draw up a report for feeding the analysis by the Commission services of the state of the market.

2. Limitations and challenges of the evaluation

2.1. Level of participation

Overall, the level of participation of stakeholders in the consultation activities and their representativeness is satisfactory. The Commission services received 53 submissions from 55 stakeholders in response to the call for evidence and 32 responses to the targeted questionnaires. The feedback received from stakeholders in the evaluation gives a fair representation of the opinions of carriers, their customers, and other players of the maritime supply chain. However, only two national competition authorities took position, which is nevertheless not surprising considering the geographic scope of maritime services, the long-lasting existence of antitrust exemptions and, consequently, the limited enforcement experience of Member States. Similarly, only ministries of two Member States provided feedback.

2.2. Quality of contributions

While the overall quality of contributions to the evaluation is satisfactory, the following has to be noted regarding the quality of responses to the targeted questionnaire:

- carriers have not been able to provide robust and comprehensive data on the consortia to which they belong that would be covered by the CBER;

- no carrier has indicated that it assesses compliance of a consortium with EU competition law only;
- carriers as well as transport users have not distinguished between consortia within and outside the scope of the CBER for the assessment of consumer benefits. Therefore, although the assessment should focus on block-exempted consortia only, it has been in practice necessary to carry out an assessment of the effects of consortia in general.

The Commission services also received two econometric studies to support carriers' claims about the efficiencies brought by consortia and the exogenous causes for the deterioration of the liner shipping services during COVID times. However, these econometric studies have methodological limitations, in particular where it comes to the assessment of causality between consortia and the claimed benefits for transport users and the environment.

In addition, the evaluation period has been characterised by volatile market conditions, notably sudden price hikes and drops, swings in demand, port and landside disruptions, etc. This volatility has added to the difficulty, already identified in the last evaluation report of the CBER, in designing a robust methodology identifying the benefits attributable to block-exempted consortia.

The above-mentioned limitations call into question the probative value of the contributions received for the purposes of evaluating, notably, the relevance of the CBER. More generally, it has proved impossible to define a methodological approach that isolates the effects of the CBER from the general factors affecting the liner shipping industry.

2.3. The method of the evaluation

An evaluation needs an appropriate point of comparison to be able to assess the change that the EU action has brought over time. In general, the main baseline (or counterfactual) is a situation in the absence of EU intervention. However, consortia have been existing in the container liner shipping industry for a very long time. Also, EU legislation block exempting consortia has been in force for decades. It is therefore not possible to compare the CBER with a situation in the absence of the CBER or of consortia in general.

The assessment of the effectiveness of the CBER has required an extensive exercise of collection of data from carriers. To fill the gaps, overcome inconsistencies and check the overall reliability of the data submitted by carriers, the Commission services have used data provided by MDS Transmodal, as well as the World Shipping Council.

Regarding the econometric studies, the Commission services have collected the raw data, requested clarification of the underlying assumptions and re-run the models to test the robustness of the results.

The evaluation questions and criteria are presented in Annex III below.

ANNEX III. EVALUATION MATRIX

Evaluation criteria	Evaluation questions	Data sources	Points of comparison	Indicators
Effectiveness	<ol style="list-style-type: none"> 1. What is the share of consortia covered by the CBER amongst consortia serving EU ports and what is their profile? 2. To what extent has the CBER facilitated the creation and operation of consortia between small- and medium-sized carriers? <ol style="list-style-type: none"> a. Has the CBER made any material difference for the target group of carriers (small and medium-sized carriers)? b. Has the CBER allowed smaller carriers to cooperate between themselves to reach scale and to remain competitive with larger carriers in terms of costs and frequencies and thereby positively contribute to the promotion of competition? 	<p>Fact-finding exercise, responses to targeted questionnaires, MDS</p> <p>Transmodal report, meetings with stakeholders, publicly available reports and databases</p>	<p>Assessment of the extent to which the CBER has fulfilled its two specific objectives, i.e. (i) to provide legal certainty to carriers, in particular small and medium-sized ones, as to the forms of cooperation that can be considered as compliant with Article 101 TFEU, and (ii) to simplify administrative supervision by providing a common framework for the Commission, national competition authorities and national courts.</p>	<p>Quantitative:</p> <ul style="list-style-type: none"> - Number of consortia facilitated by the CBER - Number of consortia made of small- and medium-sized carriers - Level of concentration on trades to and from the EU <p>Qualitative:</p> <ul style="list-style-type: none"> - Share of carriers, notably small- and medium-sized carriers, using the CBER to self-assess compliance with EU competition law - Share of carriers, notably small- and medium-sized carriers, stating that the CBER had a role in their decision to cooperate with other carriers
Efficiency	<ol style="list-style-type: none"> 1. To what extent has the CBER brought legal certainty (see also question 2 under Effectiveness)? 2. To what extent has the CBER brought compliance cost savings (see also question 2 under Effectiveness)? 	<p>Fact-finding exercise, responses to targeted questionnaires, feedback from call for evidence, meetings with stakeholders</p>	<p>Assessment of the extent to which the CBER has fulfilled its two specific objectives, i.e. (i) to provide legal certainty to carriers, in particular small and medium-sized ones, as to the forms of</p>	<p>Quantitative:</p> <ul style="list-style-type: none"> - Compliance costs incurred by carriers for consortia falling within and outside the scope of the CBER (costs of self-assessment)

	<p>3. To what extent has the CBER simplified administrative supervision of the container liner shipping sector (see also question 2 under Effectiveness)?</p>		<p>cooperation that can be considered as compliant with Article 101 TFEU, and (ii) to simplify administrative supervision by providing a common framework for the Commission, national competition authorities and national courts.</p>	<p>Qualitative:</p> <ul style="list-style-type: none"> - Specific provisions of the CBER for which carriers, notably small- and medium-sized carriers, declare that there is legal uncertainty - General provisions on cooperation between competitors for which of carriers, notably small- and medium-sized carriers, declare that there is legal uncertainty
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Coherence	<ol style="list-style-type: none"> 1. Is the CBER internally coherent? 2. Is the CBER coherent with the EU competition law? 3. Is the CBER coherent with the EU transport policy? 4. Is the CBER coherent with the EU environmental policy? 5. Is the CBER coherent with other EU and international policies? 	<p>Fact-finding exercise, responses to targeted questionnaires, feedback from call for evidence, meetings with stakeholders</p>	<p>Assessment of changes resulting from the review of the other rules and guidance for carriers to self-assess compliance of consortia with Article 101 TFEU</p> <p>Assessment of changes in other applicable EU and international rules, most notably the initiatives aimed at decarbonising the sector</p>	<p>Qualitative:</p> <ul style="list-style-type: none"> - Provisions of EU competition law for which stakeholders identify inconsistencies - Provisions of other EU and international rules, in particular EU environmental and transport policy, for which stakeholders identify inconsistencies
EU added value	<ol style="list-style-type: none"> 1. To what extent has the CBER, as a sector-specific EU regulation, brought added value? <ol style="list-style-type: none"> a. Has the CBER made a difference and to whom? b. Has the CBER had unintended effects? 	<p>Fact-finding exercise, responses to targeted questionnaires, feedback from call for evidence, meetings with stakeholders</p>	<p>Assessment of whether the CBER has achieved its operational objective of creating a legal framework supporting the competitiveness of small and medium-sized carriers active on EU trades</p>	<p>Qualitative:</p> <ul style="list-style-type: none"> - Benefits of the CBER identified by stakeholders, notably small- and medium-sized carriers
Relevance	<ol style="list-style-type: none"> 1. Can it be concluded with a sufficient degree of certainty that consortia covered by the CBER continued to fulfil the conditions of Article 101(3) TFEU? <ol style="list-style-type: none"> a. Have consortia covered by the CBER continued to bring efficiencies? b. Have consortia covered by the CBER continued to bring consumer benefits? c. Have consortia covered by the CBER continued to bring environmental benefits? d. Is it possible to demonstrate the causality between consortia covered by the CBER on the one hand and efficiencies and consumer benefits on 	<p>Fact-finding exercise, responses to targeted questionnaires, feedback from call for evidence, MDS Transmodal report, meetings with stakeholders, publicly available reports and databases</p>	<p>Original needs and objectives behind the CBER, i.e. to contribute to the improvement of the competitiveness of the EU liner shipping industry and the development of EU trade</p> <p>New needs arising from, notably, the changes in the market structure as well as the economic, environmental and technological challenges faced by the sector</p>	<p>Quantitative and qualitative:</p> <ul style="list-style-type: none"> - Efficiencies brought by consortia covered by the CBER - Consumer benefits brought by consortia covered by the CBER - Contribution of the block-exempted consortia to the improvement of the competitiveness of EU liner shipping industry - Contribution of the block-exempted consortia to the development of EU trade

	<p>the other hand?</p> <p>e. Are consortia covered by the CBER indispensable within the meaning of Article 101(3) TFEU?</p> <p>2. Have consortia covered by the CBER continued to contribute to the improvement of the competitiveness of the EU liner shipping industry and the development of EU trade?</p>			
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ANNEX IV. OVERVIEW OF BENEFITS AND COSTS

Table 1. Overview of costs and benefits identified in the evaluation

		Citizens/Consumers		Businesses		Administrations		Others	
		Quantitative	Comment	Quantitative	Comment	Quantitative	Comment	Quantitative	Comment
<p align="center">Costs:</p> <p>Direct compliance costs (adjustment costs, administrative costs, regulatory charges)</p> <p>Enforcement costs (costs associated with activities linked to the implementation of an initiative such as monitoring, inspections and adjudication/litigation)</p> <p>Indirect costs (indirect compliance costs or other indirect costs such as transaction costs)</p>	<p align="center">Recurrent</p>	The evaluation has not identified direct compliance costs, enforcement costs or indirect costs of the CBER for citizens / consumers.	-	The evaluation has not identified direct compliance costs, enforcement costs or indirect costs of the CBER for businesses.	Carriers do not specifically assess only compliance of their consortia with the CBER but with EU competition law as a whole and with other international laws. Moreover, carriers assess their compliance with in-house resources, making it difficult to assess the costs incurred.	The evaluation has not identified direct compliance costs, enforcement costs or indirect costs of the CBER for administrations.	Enforcement experience has been limited due to the long-lasting existence of the CBER and of preceding antitrust exemptions.	N/A	N/A

<p style="text-align: center;">Benefits:</p> <p>Direct benefits (such as improved well being: changes in pollution levels, safety, health, employment; market efficiency)</p> <p>Indirect benefits (such as wider economic benefits, macroeconomic benefits, social impacts, environmental impacts)</p>	Recurrent	The evaluation has not identified direct or indirect benefits of the CBER for citizens / consumers.	-	The evaluation has not identified direct or indirect benefits of the CBER for businesses.	As to direct benefits, some carriers have indicated that without the CBER their actual compliance costs (which anyway comprise not only CBER-related costs but costs for complying with all applicable international laws) would be higher. They have however not given a more precise quantification of such savings.	The evaluation has not identified direct or indirect benefits of the CBER for administrations.	Enforcement experience has been limited due to the long-lasting existence of the CBER and of preceding antitrust exemptions.	N/A	N/A

1. Introduction

To evaluate the performance of the CBER since 2020, the Commission services have collected evidence and views from numerous stakeholders on the effectiveness, efficiency, coherence, EU added value and relevance of the CBER.

2. Stakeholder groups covered by the consultation activities

Before the start of the evaluation process, as part of their sectoral monitoring activities, the Commission services performed a fact-finding exercise by sending in December 2021 questions to carriers active on trades to and from the EU. The purpose was to collect market information on changes in market circumstances in 2020-2021, in particular since the start of the COVID-19 pandemic.

The Commission services identified the following three main groups of stakeholders to be covered by the consultation activities:

- a. Carriers and their representative associations;
- b. Shippers and freight forwarders (as the customers of liner shipping services) and their representative associations;
- c. Port authorities and terminal operators, and their representative associations.

The Commission services also consulted the national competition authorities in EU/EEA States through the European Competition Network. Meetings were also organised with other national bodies in EU/EEA States countries and BEUC, the umbrella organisation for EU consumer groups.

The general public was consulted through the 8-week call for evidence published on the Commission's central webpage *Have your say*. The Commission services also welcomed position papers from industry analysts, academics, and law firms specialising in competition law and the maritime sector, which constituted valuable inputs.

3. Call for evidence

From 9 August 2022 to 3 October 2022, the Commission services carried out a call for evidence. The feedback to the call for evidence for the evaluation of the CBER is available on the *Have your say* portal¹⁵². The launch of the call for evidence was accompanied by a press release¹⁵³. The consultation was published in all official

¹⁵² https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation/feedback_en?p_id=31369245

¹⁵³ https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4864

languages of the EU and replies could be submitted in any of the 24 official EU languages.

a. Carriers

One association representing carriers responded. It took the view that the CBER should be extended without any amendments since consortia continued to bring environmental, macroeconomic and consumer benefits over the evaluation period.

b. Shippers and freight forwarders

A total of 33 responding transport users submitted their feedback to the call for evidence. Out of the 33 respondents, 4 respondents were EU citizens, and 29 respondents were companies or associations representing the interests of shippers and freight forwarders.

Out of the 33 respondents, 24 stated that they were against the extension of CBER. They considered the CBER to be no longer fit-for-purpose, nor effective, efficient, coherent, relevant or bringing any EU added value. The respondents argued that, in a context of concentration in the market of maritime services, the decision of the Commission in March 2020 to extend the CBER until 2024 contributed to a degradation of the quality of services, a sharp increase in freight costs and a distortion of competition between players of the global supply chain.

The remaining 9 respondents, which included 3 EU citizens, and 1 consumer organisation (BEUC), supported the extension of CBER subject to certain changes. These respondents recognised the overall economic benefits of CBER. However, they added that the renewal of the CBER should be made conditional upon the improvement of the quality of services offered by consortia and the pass-on of the cost efficiencies to consumers in the form of lower freight rates.

c. Port and terminal operators

There was a total of 2 respondents, one representing port and terminal operators and one representing an organisation of seaports. The first respondent did not take a position on the expiry of the CBER. The second respondent supported the extension of CBER but requested modifications to have clearer guidance and increased monitoring.

d. National competition authorities

The Commission services received two contributions from national competition authorities. The German national competition authority opposes the extension of the CBER due to lack of evidence of compliance with the conditions of Article 101(3) TFEU, whereas the Bulgarian national competition authority supports its extension.

e. Other stakeholders

The following other stakeholders responded to the call for evidence: 7 trade unions, 2 NGOs and 4 shipowners' associations.

i. Trade Unions

All of the 7 trade unions indicated that they were against the extension of the CBER because of the deterioration of service quality and the creation of oligopolies which have created market distortions and pressure for all the workers along the supply chain.

ii. NGOs

The 2 NGOs also expressed their concerns that the CBER is not adapted to the new market circumstances and contributes to unfair benefits enjoyed exclusively by the shipping lines. One of the NGOs took position against the extension of CBER, while the other one called on the Commission to evaluate the effect of CBER and reconsider its extension.

iii. Shipowners' associations

In addition to the association representing carriers, 4 shipowners' associations responded to the call for evidence. Out of the 4 respondents, 3 support the extension of the CBER unchanged, while 1 supported an extension of the CBER accompanied by clearer guidance from the Commission.

The 3 associations arguing in favour of the unchanged extension pointed to the overall economic and environmental benefits of the CBER and considered it to be an effective tool to alleviate compliance burdens for carriers.

4. Targeted questionnaires

In August 2022, the Commission services sent targeted questionnaires to several stakeholders.

The consultation consisted of three separate questionnaires targeting the following groups of stakeholders: carriers, customers (shippers and freight-forwarders), and port and terminal operators.

To assure a broad outreach and representative sample of the stakeholders concerned, the Commission services sent the targeted questionnaires also to associations representing the main groups of stakeholders: European Community Shipowners' Associations (ECSA), World Shipping Council (WSC), CLECAT, International Federation of Freight Forwarders Associations (FIATA), Baltic Ports Organization (BPO), European Maritime Pilots' Association (EMPA), European Tugowners Association (ETA), and FEPORT.

The Commission services sent 69 questionnaires in total (24 to carriers and their associations, 24 to shippers and freight forwarders and their associations, and 21 to port and terminal operators and their associations). The Commission services received 13 responses from carriers, 10 responses from shippers and freight forwarders (including associations), and 9 from port and terminal operators (including associations).

a. Carriers

Relevance of the CBER

The questions on relevance were meant to determine whether in 2020, 2021 and 2022, consortia continued to generate efficiency gains, a fair share of which was passed on to consumers.

Out of the 13 responding carriers, 8 declared that they belonged to one of the three global alliances, 2 declared that they operated in other consortia and 3 that they only provided services independently. The latter 3 respondents therefore indicated not to be in a position to assess whether in 2020, 2021 and 2022 consortia generated efficiency gains partly passed on to consumers.

All 10 respondents members of consortia considered that the increase in freight rates and deterioration in service quality in 2020-2022 were the result of exceptional circumstances during the COVID-19 pandemic and of systemic supply chain issues on which carriers have no control. According to them, the 2020-2022 period is not representative of the normal functioning of the maritime supply chain and cannot provide useful information for the assessment of the impact of consortia and the relevance of the CBER. They therefore submit that it is impossible to quantify efficiencies stemming from consortia in 2020, 2021 and 2022 and that the assessment of potential efficiency gains of consortia should not be assessed over the 2020-2022 period but at a later point in time when all the market and competition parameters have normalised, i.e. port congestion has eased and sufficient capacity has become available to transport users.

Effectiveness, efficiency and EU added value of the CBER

The questions on effectiveness were meant to determine whether the CBER in 2020, 2021, and 2022 facilitated economically efficient cooperation between carriers that also benefitted consumers. The questions on efficiency were meant to determine whether the CBER reduced compliance costs for carriers. The questions on EU added value invited carriers to compare the assessment of the compatibility of consortia with Article 101 TFEU using the CBER and in a theoretical situation absent the CBER.

Out of the 10 respondents members of a consortium in 2020, 2021 and 2022,¹⁵⁴ 8 indicated that they assessed, in 2020, 2021 or 2022, compliance of one or several of the consortia they belonged to with EU competition law.

For the 8 carriers having indicated that they assessed, in 2020, 2021 or 2022, compliance of one or several of their consortia with EU competition law, 7 mentioned the CBER as one of sets of EU rules that they relied on. However, 4 respondents were not in a position

¹⁵⁴ See above under “Relevance” – 3 of the in total 13 respondents provide services independently and not as member of any consortium and thus did not answer the question.

to quantify, or even give a broad estimation of, the costs of assessing compliance of consortia they belonged to with EU competition law.

Coherence of the CBER with EU policies

The questions on coherence aimed to determine whether the CBER was coherent with other EU policies, especially whether consortia contributed to the objectives of the European Green Deal.

Out of the 10 respondents that were member of a consortium in 2020, 2021 and 2022¹⁵⁵ all stated that in 2020, 2021 and 2022 consortia contributed to the achievement of the objectives of the European Green Deal (e.g., reduction of greenhouse gas emissions and energy efficiency). However, none of these 10 carriers provided evidence (with substantiated examples) of a possible difference in the environmental impact and energy efficiency of container liner shipping services provided as an independent carrier and as a member of a consortium in 2020, 2021 or 2022.

One independent carrier stated to have not seen any tangible difference in the environmental impact or energy efficiency between independent carriers and consortia members in 2020, 2021 and 2022.

b. Shippers and freight forwarders

As a preliminary comment, in the following overview of responses, each association of shippers and freight forwarders accounts for one respondent, although it represents a much larger base of individual undertakings. For example, CLECAT, the European Association for Forwarding, Transport, Logistics and Customs Services represents 24 national freight forwarder and logistics associations, including large but also small and medium-sized enterprises, and in total more than 19 000 companies. The International Federation of Freight Forwarders Associations (FIATA) represents freight forwarding and logistics industry with 113 association members and over 5 000 individual members, together representing more than 40 000 freight forwarding companies of all sizes from 155 territories. The European Shippers' Council (ESC) represents shippers and reaches out to 100 000 companies all over the EU. All those associations submitted that the CBER does no longer fulfil the conditions for being prolonged and therefore should be left to expire or give rise to a new regulatory framework.

Relevance of the CBER

Respondents indicated that the functioning of the maritime supply chain in 2020, 2021 and 2022 provides useful information for the assessment of the relevance of the CBER (7 out of all 10 respondents). According to respondents, information on the functioning of

¹⁵⁵ See above under "Relevance" – 3 of the in total 13 respondents provide services independently and not as member of any consortium.

the maritime supply chain during times of crisis or disruptions should be taken into account.

More specifically, 5 out of 10 respondents indicated that the CBER did neither prevent the price increases nor the deterioration of services during the COVID-19 pandemic, and customers did not enjoy benefits from consortia. One respondent submitted that consortia and alliances facilitated capacity redeployment in response to changing demand patterns. Another respondent submitted that the broader industry trends, including consolidation between carriers, their vertical integration and cross-membership between consortia, should also be taken into account in the evaluation of the CBER since 2020.

Regarding the impact of consortia on freight rates, 4 respondents outlined that there are very few independent carriers providing services on trades to/from the EU. Where there were both services by independent carriers and by consortia, one respondent indicated that freight rates were generally the same, and three others that there was an increase in rates overall. One respondent also indicated that on one leg of a trade (Asia-EU), in 2021 and 2022, freight rates for services provided by independent carriers were lower than the ones from consortia, and that independent carriers tried to differentiate through better service quality. Another respondent indicated that services provided by a carrier on a given trade on a stand-alone basis or as part of a consortium are not always differently priced, until they have materially different features (e.g. transit times).

Two respondents indicated that availability of services from independent carriers were characterised as lower in comparison to those provided by consortia, because there are very few independent carriers.

Respondents were split as to rate of port calls achieved by independent carriers as compared to the one achieved by consortia on a given leg of trade to or from the EU over the 2020-2022 period. One respondent for example considered that the rate of port calls achieved by independent carriers was higher on all legs of trade through the whole period; another considered that they were the same, and a third one considered that the rates of port calls achieved varied across different quarterly periods and different legs of trade.

Respondents had mixed views on delays affecting services of independent carriers as compared to consortia. One respondent for example submitted that delays from independent carriers were lower as compared to consortia and another one considered that in most instances they were higher (only 2 respondents on this point).

Respondents had also diverging opinions on the reliability of services of independent carriers as compared to consortia. One respondent for example submitted that the reliability of services operated by independent carriers was higher or the same as compared to consortia and another one considered that in most instances reliability was lower. Two other respondents submitted that reliability of services had in general severely decreased since 2020 to reach a low historic.

Five out of the 9 respondents having expressed an opinion on vertical integration considered that consortia contributed to the ability and/or incentive of carriers to invest in activities upstream, downstream or adjacent to container shipping (e.g. logistics, port or terminal operations). Five respondents submitted that the CBER and consortia have created the appropriate circumstances for excessive profits of carriers during the COVID-19 pandemic, which enabled carriers to make acquisitions along the supply chain by acquiring port terminals, forwarders and freight airlines, thus becoming vertically-integrated providers of door-to-door logistics solutions.

c. Port and terminal operators

It should be noted that each of ESPO, the association representing port administrations and port authorities of the coastal EU member states and Norway, as well as observers from Albania, Iceland, Israel, Montenegro, Ukraine and the UK), and FEPORT, which represents the interests of large variety of terminal operators and stevedoring companies performing cargo handling operations and logistics related activities in the seaports of the European Union (1225 companies which employ more than 390 000 port workers), were of the opinion that the CBER is neither relevant nor effective any longer. Each association accounts for one respondent in the following overview of responses.

Relevance of the CBER

Six out of 9 respondents indicated that the functioning of the maritime supply chain in 2020, 2021 and 2022 provides useful information for the assessment of the relevance of the CBER.

Five respondents indicated that they had to make high investments in port infrastructure in order to accommodate the ultra-large containerships increasingly used by carriers. They also mentioned the increased market power of the global alliances which ports need to accommodate. Four respondents highlighted the risks associated with those investments, which are in most cases long-term (30-50 years), highly dependent on choices made by the carriers and with a volatile time before delivering positive returns.

Four out of 7 respondents further indicated that consortia hamper port efficiencies. Increased pressure on the entire supply chain from bigger vessels, worsened schedule reliability of carriers, cancellations of port calls, decline in direct liner connectivity, shifting capacities between ports, were among the reasons mentioned for the negative externalities of consortia.

Respondents were divided as to whether consortia purchase port services jointly or not.

Four out of 7 respondents considered that consortia contributed to the ability and/or incentive of carriers to invest in port or terminal operations in 2020-2022, because consortia enabled achieving high profits over the period, which helped carriers to diversify investments and acquire assets along the logistics chain.

Finally on relevance, 5 from out of 7 respondents indicated that, given the developments in the industry in 2020-2022, consortia cannot be considered any longer an economically efficient means of cooperation that benefits consumers. They added that a number of features of the shipping industry (the powerful negotiating power of consortia, the vertical integration of carriers, the negative impact of big vessels on port efficiency, the restriction of capacity by consortia observed during the COVID-19 pandemic and the high prices during the period) should be taken into account, and that it is time to reconsider the effects of consortia on service quality and reliability as well as on the sustainability of the whole freight chain.

Effectiveness of the CBER

As to the question of whether the CBER was effective in 2020-2022 and facilitated the creation and operation of consortia, 3 out of 4 respondents indicated that the CBER was not effective during the period. They submitted that no new consortia had been founded since 2020, while the market power of the existing consortia increased and extended beyond liner shipping due to the vertical integration of carriers.

5. Other consultation activities

The Commission services held several meetings with stakeholders during which the evaluation of the CBER was mentioned. Those organised specifically in the framework of the consultation activities for the evaluation of the CBER are described below.

On 21 September 2022, the Commission services held a virtual meeting with BEUC. BEUC asked the Commission not to rely on a presumption of efficiencies but, in view of the 2020-2022 price hikes, to require strong evidence of consumer benefits brought by consortia.

On 22 September 2022, the Commission services had a virtual meeting with national competition authorities of the EU/EEA States. Regarding the relevance of the CBER, one participant stated that the effects of the COVID-19 crisis and of consortia could not be fully disentangled and that there is no evidence that consortia bring about efficiencies. Furthermore, efficiencies could be achieved through lower forms of cooperation. The CBER should therefore be phased out or, in case of prolongation, substantially amended.

On 28 September 2022, the Commission services had a virtual meeting with authorities from the relevant ministries of the EU/EEA Member States. During the meeting, one participant expressed the views that (i) the CBER worked well, (ii) the COVID-19 circumstances are exceptional and not informative of the performance of the CBER, and (iii) the CBER brings legal certainty and should be prolonged. Following the meeting, two participants sent contributions to the Commission services.

In addition, two meetings were organised, upon their request, with the World Shipping Council (and four of the carriers it represents) as well as with a body grouping French agricultural exporters.

Finally, the Commission services liaised with other jurisdictions outside of the EU/EEA to exchange views on the functioning of the container liner shipping sector and the antitrust regime applicable to it.

6. Evidence submitted outside of consultation activities

As indicated above, the Commission services organised consultation activities for the CBER evaluation until December 2022. However, after that date, the Commission services continued to meet with stakeholders upon their request and to assess any additional or complementary evidence submitted in particular by carriers, the World Shipping Council, as well as organisations representing freight forwarders or ports.

7. How input gathered during consultation activities has been considered

The input gathered in the context of the consultation work has been fully considered in the evaluation of the CBER. It has very usefully complemented the evidence collected by the Commission services as part of their general sectoral monitoring activities. In particular, it has helped the Commission services to identify the market dynamics during the evaluation period and to better understand the extent to which the CBER was still adapted to the needs and challenges of the sector.

In addition, the quality and relevance of the contributions received from stakeholders explain why all views were entirely considered, regardless of the degree of support they received from other participants in the consultation activities, and no responses to the call for evidence were discarded.