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Another Domino Falls: UK to Follow the EU in Ending the Antitrust Exemption for Liner Shipping

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In our blog back in October, we noted the European Commission's decision to let the Consortia Block Exemption Regulation (CBER) as to liner shipping expire on 25 April 2024. In a subsequent client alert, we noted that we were also waiting to see what the US Congress and the Federal Maritime Commission (FMC) would do on the same issue.

Well, another domino has fallen – the UK's Competition and Markets Authority (CMA) may now be following in the European Commission's footsteps, as it (provisionally) proposed allowing the exemption to lapse in the UK on the same date, without replacement.

In the UK, the CBER was inherited from the UK's time as a member of the EU and was retained in national law post-Brexit. The CBER offers a "safe harbor" from UK antitrust rules to shipping companies (carriers) operating to or from ports in the UK. It exempts minor consortia (with market shares less than 30% combined) from undergoing a specific assessment under antitrust law on the condition that they do not engage in hardcore restrictions such as fixing prices or sharing markets. With CBER set to expire in April 2024, it is now up to the CMA to recommend to the government whether to extend the regime.

In January 2023, the CMA issued a provisional position suggesting the extension of the CBER regime, which would formally be replaced by the Liner Shipping Consortia Block Exemption Order (CBEO). When invited to provide their views, several stakeholders have expressed disagreement with the CBER extension (including British freight forwarders and logistics companies). For example, the British International Freight Association noted that “by being able to enter into consortia agreements, shipping liners are effectively able to protect their core business and then use this to their advantage in other parts of their business, which freight forwarders simply cannot compete with”, and concluded that there is no level playing field because of CBER.

Following feedback, the CMA now seems to have changed course. On 17 November 2023, it has provisionally decided not to recommend a new CBER. It stated that “following [the] consultation, and in light of further assessment conducted by the CMA, the CMA no longer proposes to recommend replacement of the retained CBER”. The evaluation process is still ongoing with the public consultation due to close on 15 December 2023.

If the CBER lapses in the UK, which now seems likely, minor consortia will lose the specific legal framework under which they have been operating and will now have to assess the compatibility of their agreements with the UK antitrust law. As for consortia above the market share thresholds, there will be no formal change, as they have always had to self-assess. However, the absence of sector-specific guidance is likely to complicate the assessment for all carriers, in the UK as much as in the EU, as explained further on our blog.

Carriers may, therefore, wish to obtain legal advice to assess the legality of any pre-existing vessel sharing agreements (VSA) under English law. If they do not have the option to renegotiate the VSA terms into a form that is compliant with UK antitrust law, it may be necessary to terminate the VSA, for example, by reference to the contractual termination provisions or, in specific circumstances, the common law doctrine of frustration. In either case, the lapsing of the CBER will mark an important shift for carriers that have become reliant on pooling capacity and vessel sharing to perform their role within the supply chain. Such carriers should assess the impact this may have on their contractual obligations to clients and, where necessary, seek to mitigate these.

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