

**COMMISSION CONSULTATION ON  
CONSORTIA BLOCK EXEMPTION REGULATION**

**SUBMISSION**

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This submission is made on behalf of the World Shipping Council (“WSC”), the European Community Shipowners’ Associations (“ECSA”), the International Chamber of Shipping (“ICS”) and the Asian Shipowners’ Association (“ASA”)<sup>1</sup> in response to the European Commission’s public consultation regarding its evaluation of the Consortia Block Exemption Regulation.

## **A. Executive Summary**

Commission Regulation (EC) No 906/2009 – commonly known as the consortia block exemption regulation or “BER” – and its predecessors have since 1995 provided legal certainty that has allowed liner shipping companies to increase their service offerings and maximize their efficiency by sharing vessels. Those service improvements have been passed on to shipping line customers through a transportation network that has expanded to accommodate growing international trade, all while reducing freight rates by half over the past twenty years.

Liner shipping is that segment of international shipping that operates on fixed schedules, using groups or “strings” of vessels that make regular weekly calls at pre-announced ports. Ships sail whether they are empty or full, and capacity that is not used on one voyage cannot be used on another. If a space is left empty, it represents a lost opportunity, and a cost, that cannot be recovered.

The liner shipping industry is prone to overcapacity for several reasons. Demand for services is seasonal, cyclical with changes in trading patterns and variations in the global economy, and usually asymmetric on any given trade lane (typically with a “head-haul” direction that accounts for more cargo volume than a lower-volume “back-haul” direction). In contrast to these short-term variations in demand, supply is provided by expensive ships with useful lifespans of around 25 years and has to be able to cover the head-haul volume, meaning it is automatically underutilized on the back-haul voyage. Under these structural conditions it is difficult at best to match supply to demand and thus to maximize the efficient use of vessel fleets. Overcapacity is also caused by the mismatch between demand growth and delivery of vessels, which typically occurs

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<sup>1</sup> EU Transparency Register numbers: / WSC: 32416571968-71 / ECSA: 59004966537-01 / ICS: 90104608462-14 / ASA: 758817833399-63.

3-5 years after a vessel is ordered (ordering decisions are based on expected growth in global demand, which is relatively inelastic from the perspective of carriers).

A tool for maximizing efficiency in liner shipping that is ubiquitous and critical for the successful operation of the global water-borne containerized supply chain is vessel sharing – or “consortia” in the terminology of the BER. Vessel sharing can take many forms, but all forms are variations on a simple idea. By having one or more partners among which space on ships is shared, more carriers can offer scheduled services to more ports than those carriers could offer individually. The consolidated cargo volumes allow carriers to deploy bigger, more efficient vessels, which the carriers could not deploy if they all were operating individually. The Commission has recognized this basic service- and efficiency- enhancing characteristic of liner shipping consortia when it adopted its original regulation and in each successive review of that regulation since adoption. The Commission has similarly recognized that the benefits are passed to the shipping lines’ customers -- the shippers that move their goods in international trade and that provide the backbone of the global economy.

In addition to the economic efficiencies created by vessel sharing and passed on to customers of shipping lines, vessel sharing is an important tool for reducing air emissions from ships. This includes both emissions such as sulphur oxides (SO<sub>x</sub>) that are regulated for human health reasons and greenhouse gases. In 2020, the same year that the consortia BER will expire if not renewed, new global regulations on marine fuel sulphur content will become effective that will substantially increase fuel prices, and carriers will need to use every available efficiency tool in order to maintain services and minimize cost increases associated with that necessary environmental protection. Similarly, with respect to greenhouse gases, the International Maritime Organization has adopted a target of a 50% reduction in GHGs from shipping by 2050 compared to 2008. Much will have to be done to meet that target, and one of the core efficiency tools is vessel sharing, which is encouraged and facilitated by the consortia BER. Good trade policy and good competition policy are also good environmental policy in this case.

The shipping industry has seen changes since the Commission last reviewed the consortia BER five years ago. There has been consolidation, and the alliances that operate in the major east-west trades have been re-shuffled, in part in response to the merger and acquisition activity. Despite

those recent changes, however, the basic structure of the industry remains the same. On a global basis, the industry remains unconcentrated, and there is fierce competition among carriers, whether they share space on their ships or not. Furthermore, no single carrier has reached a sufficient size to operate a global network, meaning that consortia remain very relevant. Alliances, which have existed for over two decades, are still vastly outnumbered by the number of non-alliance services in EU international trades: it is estimated that there are 61 vessel sharing arrangements outside the big 3 alliances and at least an additional 57 services with slot agreements with third parties in place. Virtually all of those smaller vessel sharing arrangements are within the strict market share boundaries of the BER safe harbor, and are properly viewed as presenting minimal risk to competition. These are the arrangements that are the most nimble and flexible, and that are therefore most critical to providing prompt responses to changes in market demand. The BER gives shipping companies the legal certainty to confidently and quickly enter, amend, or leave these arrangements on relatively short notice, and with minimal transactional and regulatory cost.

The BER is the only guidance that the liner industry has that speaks with any specificity at all to the well-known and ubiquitous vessel sharing structure that is an integral part of international liner shipping. Legal certainty is provided for vessel sharing arrangements in all major maritime trading nations around the world. Although that legal certainty takes different forms in different countries, no small number of jurisdictions have based their legal understanding and their legal structures on the experience of the EU in its adoption and adaptation of the BER over the past nearly quarter century. That body of relative uniformity around the world is essential to this most global of industries, and the BER is at the center of that international comity.

The consortia BER continues to provide an important legal tool to an industry that is highly competitive, that has invested to consistently provide adequate capacity to move the world's trade, and that has done so at prices that have fallen for decades as the industry continually both innovates and passes the benefits of that innovation on to its customers. The BER is an integral part of a system of international ocean transportation that continues to work well for Europe and for the world, and the Commission should renew the BER for an additional five years.

## **B. Context of the review**

### **1. The rationale and history of the Consortia BER**

The rationale of the Commission Regulation (EC) No 906/2009 (referred to in this paper as the “Consortia BER”, or “BER”)<sup>2</sup> and its predecessor regulations has been to promote efficiency-enhancing operational cooperation between liner shipping companies by providing a clear, simple and flexible legal framework for the adoption and alteration of such arrangements with minimal compliance costs.

Liner shipping involves the provision of regular scheduled services (usually weekly) for the carriage of cargo. To offer a liner shipping service on a certain trade route once a week, a minimum number of vessels is required, which is known as a string or loop. For example, on the North Asia to Northern Europe trade, a string consists of between 10 and 12 vessels. Often, a consortium must deploy multiple strings to offer the multi-port services required by many shippers. The nature of liner shipping means that customers generally need consistent levels of capacity each week, subject to seasonal fluctuations. So, vessels deployed on a given string must be as close in size to one another as possible, or the carrier will not be utilising each ship's full capacity.

The high minimum viable scale on each trade means that carriers often cannot enter or sustain a service alone. Instead, companies can offer a joint service through a consortium. Under a consortium, all parties provide one or more vessels and in exchange receive a number of slots across all vessels in the joint service. Each carrier's allocation of slots is determined by the total vessel capacity that they contributed. The costs of each vessel are borne by its respective owner, not the consortium. Within the joint service, the members have a strong incentive to offer their slots to individual customers at a competitive price because they are not compensated if their slots are not used. The members of the consortium jointly decide the sailing timetable, but there is no price coordination, joint marketing, revenue sharing or, with some limited exceptions, joint purchasing. The Consortia BER exempts both single and multi-trade arrangements.

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<sup>2</sup> 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. 31–34.

Consortia promote competition by lowering barriers to entry on a given trade. This, in turn, ensures that customers have a wider range of carriers to choose from, increasing competition. They also enable smaller parcels of capacity to be added to a trade than would be required by a single carrier to operate a scheduled service, and thereby enable capacity to be adjusted more accurately to demand. For these reasons, consortia are particularly important for small and medium size shipping companies. By allowing these carriers to achieve economies of scale that would otherwise be impossible, consortia overcome barriers to entry. The Consortia BER provides the legal underpinning for such arrangements in a cost-efficient way.

Since Commission Regulation (EC) No 870/95, adopted pursuant to Council Regulation (EEC) No 479/92, the Commission has consistently recognised the efficiencies created by consortia agreements and, subject to certain conditions, has block exempted them.

The current Consortia BER states that *“Consortia... generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilisation of port facilities. They also help to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity”*.<sup>3</sup>

In 2009, the Commission amended the Consortia BER in light of the abolition of the liner conference block exemption. Amongst other things, the market share threshold for the Consortia block exemption was reduced from 35% to 30%. Following these changes, the Commission concluded in its subsequent review in 2014 that *“Since the new legal framework has been in place and applied for only a short period of time, further changes should be avoided at this stage. This will avoid increasing the compliance costs of the operators in the industry”*.<sup>4</sup>

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<sup>3</sup> Recital 5

<sup>4</sup> Commission 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. 3–3, recital 2 (“Commission Regulation 697/2014”).

The Commission also declared:

*“On the basis of the Commission's experience in applying the block exemption, it appears that the justifications for a block exemption for consortia are still valid and the conditions on the basis of which the scope and content of Regulation (EC) No 906/2009 were determined have not substantially changed”.*<sup>5</sup>

The Commission has succinctly summarised the benefits achieved by consortia and the reasons why it has consistently block exempted them. In recent merger decisions the Commission has repeatedly stated:

*“Since 1995 the Commission has put in place several Block Exemption Regulations (“BER”) concerning the container liner shipping industry. The Commission acknowledges that although the cooperation of consortia members in jointly operating container liner shipping services is likely to restrict competition, it also enables achieving certain efficiencies, notably by improving the productivity and quality of the available liner shipping services, by enabling the rationalisation of services and economies of scale, by offering greater frequencies, port calls, and, more generally, by promoting technical and economic progress. For customers to benefit from those efficiencies, however, sufficient competition should be maintained in the market. This condition is met, according to the BER, where the market share of a consortium does not exceed 30% on a given trade and the consortium agreement does not include features likely to significantly restrict competition, such as the fixing of prices, the limitation of capacity, and the allocation of customers or markets”.*<sup>6</sup>

For the reasons that will be explained in this paper, there are no good reasons for the Commission to depart from this assessment.

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<sup>5</sup> Commission Regulation 697/2014, recital 1.

<sup>6</sup> COMP/M.8120 *Hapag-Lloyd/UASC* (23/11/2016), para 38. See also COMP/M. 7268 *CSAV/ HGV/ Kühne Maritime / Hapag-Lloyd* (11/09/2014), para 56; COMP/M.7908 *CMA-CGM/NOL*, (29/04/2016), para 26.

## 2. Developments in the liner shipping industry

The Commission refers to a number of developments which have taken place in the industry since the last review:

*“Furthermore, in recent years, given the challenging economic context, the liner shipping industry has been undergoing a significant process of consolidation. Some carriers exited the market, merged or cooperate in increasingly larger consortia, and some continue to cooperate in smaller consortia. Under such circumstances, the question arises of the continued relevance of the Regulation.”<sup>7</sup>*

As the Commission notes, the liner shipping industry has undergone a period of consolidation. Since the last review, COSCO and China Shipping Group (2015), CMA CGM and Neptune Orient (2016), Hapag-Lloyd and United Arab Shipping Co (2017), and Maersk and HSDG (2017) have all combined. NYK, K line, and MOL (2017) also created a joint venture, Ocean Network Express (ONE), which includes each of their respective liner shipping businesses. COSCO has also acquired Orient Overseas International (2018). These transactions (and the commitments required as a condition of EU merger clearance) had a significant impact on the membership of the major alliances and several smaller consortia.

Nonetheless, the level of consolidation in the liner shipping industry should not be overstated. As the Commission noted in Maersk/HSDG, the industry remains “rather fragmented”.<sup>8</sup> The **RBB Report** at Annex 1 shows that Maersk, the largest carrier, has only 17.7% of global fleet capacity; MSC, CMA CGM and COSCO individually have less than 15% of total fleet capacity, and the fifth biggest carrier, Hapag-Lloyd, has less than 10%. Combined, this 'top five' have less than 65% of the world's fleet capacity.

Despite the consolidation that has occurred, the liner shipping industry is far from concentrated. The RBB Report<sup>9</sup> shows that the HHI of the industry at a global level is below 1000: calculated on the basis of global capacity shares, the HHI of the largest 30 carriers is 955. The Horizontal

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<sup>7</sup> Commission’s Evaluation and Fitness Check Roadmap - Ares(2018)2422025 (“Roadmap”).

<sup>8</sup> COMP/M.8330 *Maersk Line/HSDG* (10/04/2017), para 49.

<sup>9</sup> RBB Report, section 4.4.

Merger Guidelines of the European Commission state that “[T]he Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1 000. Such markets normally do not require extensive analysis.”<sup>10</sup> The US DOJ and FTC Horizontal Merger Guidelines state that a market is unconcentrated where it has an HHI score below 1500.

It is also critical for the evaluation of the Consortia BER that the review does not only focus on the three major alliances: these alliances do not cover North-South trades, do not cover cooperation between carriers within regions, including Europe, and do not include all cooperation between carriers on the East-West routes. The RBB Report includes tables providing a comprehensive overview of consortia as at early November 2018 for the major trade lanes and with indicative capacity shares. These show that (a) there is a vast number of consortia operating outside the three major East-West alliances and (b) it is highly likely that the large majority of these cooperation agreements do not exceed the market share threshold of the BER. The present review needs to take these numerous consortia into account when considering the effectiveness and relevance of the Consortia BER, and the harm<sup>11</sup> that would be caused to these efficiency-enhancing arrangements if the BER were allowed to expire.

The RBB Report also finds that prices for liner shipping services have decreased significantly over time. Specifically, it finds that global average quarterly container freight rates have dropped by over 30% during the past 6 years.<sup>12</sup> The same trend is evident on the East-West trades, with an even bigger drop (almost 40%) if bunker surcharges (“BAF”) are excluded.<sup>13</sup> The RBB Report also finds that profitability of carriers remains consistently low,<sup>14</sup> which suggests, together with the price decreases, that there is fierce competition in the industry. The RBB Report draws three key conclusions:

- Consortia do not result in less effective competition, and may in fact have contributed to more competition in the industry.

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<sup>10</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *OJ C* 31, 5.2.2004, p. 5–18, para. 19 (“Horizontal Merger Guidelines”).

<sup>11</sup> See in particular Section 2 below.

<sup>12</sup> RBB Report, section 4.2, figure 2.

<sup>13</sup> RBB Report, section 4.2, figure 3.

<sup>14</sup> RBB Report, section 4.3.

- Consortia may well have contributed to competition in the industry by lowering entry barriers, thereby allowing firms to compete on routes for which they would otherwise – absent cooperation – suffer a lack of scale or a lack of demand. Absent cooperation, firms may not have been able to continue to operate on certain trades, or would have been forced to offer an inferior, much less frequent and economic service.
- Fierce competition in the industry strongly suggests that the benefits of the cooperation agreements between carriers have been passed on to customers through lower pricing and the availability of services that would not exist in the same form in the absence of cooperation between carriers.

It is also relevant to note that, in the context of prior merger review proceedings, the Commission has had the opportunity to review the consortia to which the merging parties belonged, and has evaluated conditions of competition under these arrangements.

The Commission has described in positive terms the benefits resulting from the deployment of larger vessels in alliances:

*"Expanding cooperation across multiple trades increases the ability of the container liner shipping companies to deploy assets in the most appropriate and cost-efficient way. If new larger ships are introduced in one trade, existing tonnage can be more easily and efficiently redeployed or cascaded into other trades. At the same time, the port coverage that each container liner shipping company can offer to its clients may be expanded, leading to enhanced customer choice and more price competition at each port location. Moreover, by forming alliances, carriers may be better placed to secure sufficient numbers of vessels to offer a fixed or weekly schedule on a more reliable basis for the benefit of their customers who seek not only lower costs, but also require certain frequency of services".<sup>15</sup>*

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<sup>15</sup> COMP/M.8594 COSCO Shipping/OOIL (05/12/2017), para 29.

Whilst the Commission has raised concerns in relation to mergers which would create links between two previously independent consortia operating on the same trade where insufficient external competition would remain, in none of the recent merger decisions has the Commission expressed concerns relating to the increased post-merger market share of the consortium to which the acquirer belongs.<sup>16</sup>

This is appropriate given the robust governance structures within consortia and the strong internal competition that exists between their members. In none of the merger decisions has the Commission found that the merged entity would have the ability to dominate or determine decision-making within the consortia to which it belongs; and the market tests carried out by the Commission in these merger reviews have confirmed that shippers regard consortium membership as having little impact on internal competition and differentiation valued by customers. For example:

*"[T]he results of the market investigation show that there is a degree of competition not only between consortia/alliances but also within consortia/alliances between their respective members. Shipping companies regrouped within a consortium/alliance may notably still compete on factors such as price and customer service. Moreover, most customers who responded to the market investigation submit that membership in consortia/alliances does not count among the most important criteria in the choice of supplier of container liner shipping services. Most customers who responded to the market investigation claim that they often or even always invite different shipping companies belonging to the same consortium/alliance on a certain leg of trade to bid for a contract on that leg of trade"*<sup>17</sup>

One significant industry development, which has not yet been noted by the Commission in the context of the BER review concerns the increasing environmental challenges facing the industry. As discussed in detail in section 4 below, the industry faces rapidly approaching implementation

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<sup>16</sup> See COMP/M. 7268 CSAV/ HGV/ Kühne Maritime / Hapag-Lloyd (11/09/2014); COMP/M.7908 CMA-CGM/NOL (29/04/2016); COMP/M.8120 Hapag-Lloyd/UASC (23/11/2016); COMP/M.8330 Maersk Line/HSDG (10/04/2017); COMP/M.8472 NYK/Mitsui/K-Line (28/06/2017); and COMP/M.8594 COSCO Shipping/OOIL (05/12/2017).

<sup>17</sup> COMP/M.8120 Hapag-Lloyd/UASC (23/11/2016), para 42.

dates for stricter regulations concerning sulphur oxide and greenhouse gas emissions. The BER is a key tool for the industry to maximize operational efficiency so that it can satisfy these regulations.

As a final remark on industry developments, we note the publication of a report entitled “*The Impact of Alliances in Container Shipping*” by the International Transport Forum (“ITF”), which advocates non-renewal of the BER. We have prepared separate comments on that report, included in Annex 2, which demonstrate that the report is internally inconsistent, contradicted by the facts, and unpersuasive in its policy recommendation. The flaws in the ITF report are also exposed in the RBB Report.<sup>18</sup>

### 3. The Commission’s policy against sector-specific regulations

The Commission states that:

*“In the years since the introduction of the first Consortia BER, the Commission has progressively repealed all maritime-specific competition legislation and guidelines as part of the general policy of harmonising competition rules and replacing sector-specific rules with measures (BERs or guidelines) providing general guidance on the application of Article 101 TFEU. Today the Consortia BER is the only remaining maritime-specific competition measure.”*<sup>19</sup>

This ‘general policy’ of harmonisation is not a sufficient justification for allowing the Consortia BER to expire.

First, the Commission’s Better Regulation Guidelines establish the mandatory framework governing the Commission’s review and the evaluations that the Commission is to undertake when conducting any legislative review.<sup>20</sup> Indeed, the Evaluation of the Consortia Block Exemption Regulation is listed on the Commission's Better Regulation initiatives website.<sup>21</sup> The

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<sup>18</sup> See RBB Report, section 5.

<sup>19</sup> Commission consultation strategy:  
[http://ec.europa.eu/competition/consultations/2018\\_consortia/index\\_en.html](http://ec.europa.eu/competition/consultations/2018_consortia/index_en.html).

<sup>20</sup> Commission Staff Working Document, *Better Regulation Guidelines*, SWD (2017) 350 (“Better Regulation Guidelines”).

<sup>21</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives\\_en?page=4](https://ec.europa.eu/info/law/better-regulation/initiatives_en?page=4).

Commission's policy against sector-specific guidelines should not be given undue importance; nor should it be allowed to prejudge the outcome of the Commission's evaluation. The Commission must give due weight to the five evaluation criteria laid down in the Better Regulation Guidelines and the Council's policy objectives reflected in Regulation 246/2009.<sup>22</sup>

Regulation 246/2009, which is the successor to Council Regulation 479/92, explains not only why consortia are capable of satisfying the conditions of Article 101(3) but why the Commission should be empowered to adopt a block exemption for consortia:

Recital 6 states:

*“Maritime transport is important for the development of the Community's trade and the consortia agreements may play a role in this respect, taking account of the special features of international liner shipping. The **legalisation** of these agreements is a measure which can make a positive contribution to improving the competitiveness of shipping in the Community”* (emphasis added).

Recital 8 states:

*“The Commission should be enabled to declare by way of Regulation that the provisions of Article 81(1) of the Treaty do not apply to certain categories of consortia agreements, decisions and concerted practices, **in order to make it easier for undertakings to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy.** ...”* (emphasis added).

Since the Council has defined the reasons why a block exemption for consortia is beneficial for the competitiveness of shipping in the Community and for economic welfare, it is not open to the Commission to disregard these reasons in pursuit of its own policy. As will be explained below, the Commission policy is not only different from the position taken by the Council: it is at odds with it. If the Commission allows the Consortia BER to expire in pursuit of its supposed policy of harmonization, this would undermine the two objectives identified in recitals 6 and 8 of Regulation

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<sup>22</sup> 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. 1–4 (“Regulation 246/2009”).

246/2009 by casting doubt on the legality of consortia and making cooperation through consortia more uncertain.

Secondly, the Commission overstates the supposed ‘general policy’ of harmonisation. It says that it has “*progressively repealed all maritime-specific competition legislation and guidelines*” but in practice that has involved the abolition of only one maritime-specific competition legislation – namely, Regulation 4056/1986<sup>23</sup> – and the expiry of one set of maritime sector-specific rules (namely, the Guidelines on the Application of Article 81 of the EC treaty to maritime transport services<sup>24</sup> (the “Maritime Guidelines”)). However, Regulation 4056/1986, a Council regulation, was not repealed in the name of the ‘general policy’ of harmonization but because liner conferences were no longer thought to satisfy the Article 101(3) exemption conditions and hence were unlawful.<sup>25</sup> This was not a case of the Commission moving from a sector-specific block exemption to a system of self-assessment based on general guidance in the name of harmonisation.

As for the Maritime Guidelines, they were originally adopted for only a 5-year period; when they were adopted, they constituted the *only* guidance on the application of Article 101 to information exchange but, when they were allowed to expire, the Commission had adopted an updated version of the Horizontal Guidelines which now included guidance on information exchange.<sup>26</sup> The Maritime Guidelines were expressly intended to provide self-assessment guidance on the information exchange system to be adopted by the liner shipping industry following the repeal of the liner conference block exemption, which had been discussed at great length with the Commission, and on tramp pools following the repeal of the exclusion of tramp shipping from Regulation 1/2003.<sup>27</sup> Accordingly, the Maritime Guidelines were expressly intended to help the

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<sup>23</sup> 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. 4–13 (“Regulation 4056/1986”).

<sup>24</sup> Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, *OJ C* 245, 26.9.2008, p. 2–14.

<sup>25</sup> 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. 1–3, recitals 4–8.

<sup>26</sup> Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, *OJ C* 11, 14.1.2011, p. 1–72 (“Horizontal Guidelines”).

<sup>27</sup> 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. 1–25.

shipping industry adapt to the full application of Article 101 following the repeal of the liner conference block exemption and the tramp shipping exclusion.

Outside the maritime transport sector, sector specific block exemptions exist for motor vehicle distribution<sup>28</sup> and certain road and inland waterways undertakings,<sup>29</sup> and there is a sector specific regulation setting out the competition rules for agricultural products (other than fisheries products).<sup>30</sup> There are also a Commission Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, various recommendations and guidelines on competition issues in the telecommunications sector, and a Clarification of the Commission recommendations on the application of the competition rules to new transport infrastructure projects.

Thirdly, the Commission has previously found that the general policy of harmonising competition rules is only an appropriate justification for removing sector-specific block exemptions if there is already equivalent Commission guidance in place to self-assess the specific form of cooperation in the sector in question.<sup>31</sup> This point will be addressed in more detail below (section 4). Suffice it to note here that the Commission has previously observed, when deciding whether a sector-specific block exemption should be renewed, that the lack of specific advice on information exchanges in the 2001 version of the Horizontal Guidelines justified its earlier decision to renew the Insurance BER.<sup>32</sup>

These points will be expanded upon below when addressing the Commission's five evaluation criteria.

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<sup>28</sup> Commission Regulation (EU) No 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, *OJ L* 129, 28.5.2010, p. 52–57.

<sup>29</sup> Council Regulation (EC) No 169/2009 applying rules of competition to transport by rail, road and inland waterway, *OJ L* 61, 5.3.2009, p. 1–5.

<sup>30</sup> Regulation (EU) No 1308/2013 of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, *OJ L* 347, 20.12.2013, p. 671–854.

<sup>31</sup> See Report from the Commission to the European Parliament and the Council on the functioning of Commission Regulation (EU) No 267/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector ("IBER report"), para 31.

<sup>32</sup> Commission Staff Working Document, Impact Assessment – HT. 4012 – IBER, para 69 ("IBER Working Document").

### C. The Commission’s Evaluation criteria

We now address the five evaluation criteria set out by the Commission.

1. **Effectiveness:** *Does the Consortia BER provide legal certainty for [an] economically efficient type of cooperation that also benefits consumers?*
- 1.1. Effectiveness analysis considers how successful the block exemption has been in achieving or progressing towards its objectives, using appropriate points of comparison, including prior impact assessments.<sup>33</sup> An important comparison is the counterfactual that would have occurred if the block exemption had not been in place.<sup>34</sup> Unlike the relevance review, the effectiveness analysis is retrospective.<sup>35</sup>
- 1.2. There are two distinct aspects to the question formulated by the Commission: (i) are consortia an “*economically efficient type of cooperation that also benefits consumers*” and (ii) does the BER provide legal certainty for such arrangements?

#### Consortia are an economically efficient type of cooperation that also benefit consumers

- 1.3. The rationale for the BER and its repeated renewals remains valid: the consortia that are covered by the BER are economically efficient arrangements that generate benefits for customers and consumers.
- 1.4. Article 103(2) TFEU establishes that all block exemptions are designed “to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest extent possible on the other”.<sup>36</sup> As for the Consortia BER specifically, empowering Regulation 246/2009 sets out the related aims of achieving economies of scale,<sup>37</sup> allowing the EU shipping industry to be globally competitive,<sup>38</sup> reducing costs, improving quality,<sup>39</sup> and

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<sup>33</sup> Better Regulation Guidelines, p.60.

<sup>34</sup> Better Regulation Guidelines, p.57.

<sup>35</sup> Better Regulation Guidelines, p.60.

<sup>36</sup> Article 103(2)(b) TFEU.

<sup>37</sup> Regulation 246/2009, recital 4.

<sup>38</sup> Regulation 246/2009, recital 4.

<sup>39</sup> Regulation 246/2009, recital 7.

making it easier for undertakings to cooperate in an economically desirable way,<sup>40</sup> while ensuring that customers receive a fair share of the benefits.<sup>41</sup>

- 1.5. Regulation 246/2009 explains the economic rationale for consortia in terms which remain relevant today. Recitals 4 and 5 read as follows:

*“Liner shipping is a capital intensive industry. Containerisation has increased pressures for cooperation and rationalisation. The Community shipping industry should attain the necessary economies of scale in order to compete successfully on the world liner shipping market. Joint-service agreements between liner shipping companies with the aim of rationalising their operations by means of technical, operational and/or commercial arrangements (described in shipping circles as consortia) can help to provide the necessary means for improving the productivity of liner shipping services and promoting technical and economic progress.”*

- 1.6. Regulation 246/2009 also describes the benefits that consortia bring to users of shipping services:

*(7) “Users of the shipping services offered by consortia can obtain a share of the benefits resulting from the improvements in productivity and service, by means of, inter alia, regularity, cost reductions derived from higher levels of capacity utilisation, and better service quality stemming from improved vessels and equipment.”*

- 1.7. Recitals 5 and 6 of the BER sets out the Commission’s analysis of consortia in similar terms:

*(5) “Consortia, as defined in this Regulation, generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilisation of port facilities. They also help to promote technical and economic progress by*

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<sup>40</sup> Regulation 246/2009, recital 8.

<sup>41</sup> Regulation 246/2009, recital 10.

*facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity. [...]”.*

*(6) “A fair share of the benefits resulting from the efficiencies should be passed on to transport users. Users of the shipping services provided by consortia may benefit from the improvements in productivity which consortia can bring about. Those benefits may also take the form of an improvement in the frequency of sailings and port calls, or an improvement in scheduling as well as better quality and personalised services through the use of more modern vessels and other equipment, including port facilities”.*

1.8. This analysis remains relevant and correct: as explained in detail in the RBB Report, included as Annex 1, the liner shipping industry is fiercely competitive, and consortia have generated consumer benefits in the form of significant price decreases and the availability of services that would not otherwise exist in the absence of cooperation between carriers. These benefits are expected to continue. Significant consumer benefits have also been demonstrated in detailed economic assessments carried out by some liner shipping companies prior to joining a consortium. Those assessments show that consortia can result in:

- Reduced bunker and port costs per Twenty-Foot Equivalent Unit (“TEU”) due to the deployment of larger vessels instead of multiple small vessels. Larger vessels consume less fuel per TEU than smaller ones, and ports often charge on a per-vessel basis.
- Better port coverage for each party to a consortium. By cooperating in a consortium, carriers can offer customers a higher number of unique port-to-port connections, also resulting in less need for transshipment of cargo.

The BER has been effective in providing legal certainty for consortia

1.9. The BER provides the greatest possible legal certainty for the conclusion and periodic modification of consortia. In addition to establishing a clearly understood market share threshold, the BER also provides a legal framework for consortia in the list of block

exempted activities and agreements (Article 3) and the conditions relating to notice periods in Article 6. As noted above, the rationale for the adoption of a block exemption is stated in recitals 6 and 8 of Regulation 246/2009. These recitals make clear that the “legalisation” of consortia arrangements through the adoption of a block exemption can contribute to the competitiveness of the shipping industry by making it “*easier*” for carriers “*to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy*” – that is, through consortia.

- 1.10. The reasons why the block exemption makes this easier than if carriers were left to self-assess remain valid. First, the BER defines consortia in a way which remains relevant and valid for the arrangements in which carriers continue to cooperate; secondly, this definition is clear and well understood, as are the conditions for application of the BER to consortia; thirdly, the BER provides complete legal certainty as to the compatibility of those consortia which satisfy its terms with Article 101, and thus their enforceability; fourthly, when Regulation 246/2009 was adopted, there was no general guidance on the application of Article 101 to consortia that provided a level of legal certainty equivalent to that provided by the BER, and this remains the case today, as will be explained further below; fifthly, since the BER makes it “*easier*” for carriers “*to cooperate in ways which are economically desirable*”, it follows that the absence of the BER would make it *less easy* for carriers “*to cooperate in ways which are economically desirable*”: this is because the general guidance on the application of Article 101 cannot possibly provide the same level of legal certainty as the BER, and recourse to self-assessment based on this general guidance will inevitably be lengthier, less conclusive and provide a lower level of legal certainty as to the compatibility of the consortium with Article 101 and thus its enforceability; sixthly, this would discourage carriers from taking certain decisions which are time-critical and/or where a high level of legal certainty is required; seventhly, this would lead to a loss of welfare benefit, as carriers choose not to amend existing consortia or to enter into new consortia.

#### Practical application of the BER

- 1.11. The BER is well-understood within the liner shipping industry and it is straightforward to apply, in particular because it is tailored to the specific features of consortia. Accordingly,

liner shipping companies rarely consult external advisors to carry out an assessment under the BER and this helps to minimise compliance costs. Not only is the BER well-understood by in-house legal/economic professionals, it is also understood by operational personnel who manage vessel deployments and network design, including through the use of consortia. Once a determination is made that a particular proposed concentration falls within the BER, the parties can focus entirely on operational details, which can be quite complex. This would certainly not be the case if consortia were subject to a system of self-assessment based on the Commission’s general guidance.

The BER has been effective in promoting the use of consortia

- 1.12. Entering into consortia would have been harder had the Consortia BER not been renewed. As noted below, there is no sector-specific guidance for liner shipping beyond the Consortia BER. Accordingly, compliance costs would have been higher and legal certainty would have been lower. This is particularly important because companies would have had to engage in multiple self-assessments. As Regulation 246/2009 notes, “*the scope, parties, activities or terms of consortia are frequently altered*”.<sup>42</sup> Whenever such a change has occurred, in the absence of the BER, a new assessment would have to be carried out, without any guidance.
- 1.13. Most shipping companies are members of numerous different consortia. For example, at the time of their merger, Hapag-Lloyd and UASC were members of 19 different consortia to and from the EU, which were active on 45 different trades (not including bi-directional trades).<sup>43</sup> Overseas Orient International and COSCO were members of seven consortia to and from the EU, which were cumulatively active on twelve trades.<sup>44</sup> Similarly, Maersk and HSDG were active on seven consortia, which were cumulatively active on 13 trades to and from the EU.<sup>45</sup> Given that facilitating economically efficient cooperation and simplifying administration are two of the Consortia BER's aims, these facts alone establish that it was effective in promoting efficiency-enhancing cooperation.

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<sup>42</sup> Regulation 246/2009, recital 9.

<sup>43</sup> COMP/M.8120 *Hapag-Lloyd/UASC* (23/11/2016), tables 1 and 2; excluding the G6.

<sup>44</sup> COMP/M.8594 *COSCO Shipping/OOIL* (05/12/2017), recital 30.

<sup>45</sup> COMP/M.8330 *Maersk Line/HSDG* (10/04/2017), table 1.

- 1.14. The lack of a Consortia BER would be particularly harmful for single trade / single loop consortia. In general, these fall well within the BER's thresholds and are essential to respond to short-term fluctuations in demand. In relative terms, the costs of compliance would be significantly higher for these consortia. The necessary flexibility of such agreements also means that they are frequently altered or replaced entirely. Absent the Consortia BER, carriers would be discouraged from entering into and altering arrangements of this kind, depriving them and their customers of the efficiency-enhancing benefits that consortia incontrovertibly provide. Flexibility is also vital because of sudden demand shocks that can occur, for instance due to regional political instability, war, the imposition of EU/US economic sanctions, *etc.*, which may require carriers to adapt their services quickly.
- 1.15. The distinguishing feature of liner shipping is the response to shippers' need for service that is frequent and regular.<sup>46</sup> Accordingly, the risk that the establishment of a joint service might be delayed because of the need to assess whether the underlying agreement is void under Article 101(2) TFEU could be intolerable. Despite the network benefits that a joint service would provide, the delays and uncertainties associated with legal assessment would put shipping companies contemplating a joint service at a disadvantage from a shipper's perspective and could also lead to higher financing costs for carriers by increasing risk. Because consortia involve the joint setting of capacity, the risk associated with an incorrect self-assessment is potentially very high.
- 1.16. We are not aware that the BER encourages types of cooperation that are not efficient or do not benefit customers. Naturally, the BER encourages carriers to adopt the various activities and practices listed in Article 3 – Exempted Agreements of the BER, which all contribute to achievement of the efficiency benefits identified in the BER. But we are not aware that the BER encourages activities that are not covered by the BER and which are not efficient or do not benefit customers. Conversely, we do not believe that the BER discourages practices that would be efficient and beneficial to customers. Whilst consortia continue to be the prevalent form of cooperation on operational matters, as shown in the Annex to the RBB Report, the liner shipping industry continues to innovate in other ways. The recent

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<sup>46</sup> COMP/M.8330 *Maersk Line/HSDG* (10/04/2017), recital 11.

announcement of the Digital Container Shipping Association to develop standards for harmonization of IT and business processes demonstrates the industry's commitment to innovate in pursuit of efficiency and modernisation outside the scope of the Consortia BER.

International legal certainty and comity

- 1.17. It is also important to consider the international impact of the BER on legal certainty and comity. The BER increases legal certainty internationally: it has encouraged other jurisdictions to adopt instruments which confer legal certainty on consortia (such as in Hong Kong, India, Singapore and Malaysia), which has increased legal certainty at both ends of the trades serving the EU.
- 1.18. Expiry of the BER would have the opposite effect: even though the absence of the BER would not render consortia unlawful, a decision by the Commission not to extend the instrument which confers legal certainty on consortia would be interpreted internationally as at least calling into question the lawfulness of such arrangements and the need for similar legal instruments which confer legal certainty on them. Whilst a developed understanding of the process involved in assessing compliance with the Article 101(3) exemption criteria rules exists in the EU, aided by the Commission's general (albeit insufficient) guidance, there is no comparable tradition in most of the EU's trading partners, with few exceptions. If other jurisdictions were encouraged by the expiry of the BER to revoke the legal instruments which confer legal certainty on consortia-type arrangements or decide not to adopt such instruments, this would leave liner shipping consortia exposed to the full and uncertain application of their competition law prohibitions. This would discourage efficiency-enhancing cooperation of this kind and could have negative effects on ocean transportation service and therefore on international trade.

2. **Efficiency:** *what is the effect of the Consortia BER on costs and to what extent? Does it help undertakings to cut costs or conversely does it increase compliance costs? Is it causing more or less burden or complexity than other policy options?*
- 2.1. According to the Better Regulation Guidelines, an efficiency evaluation should consider the costs and benefits of the BER.<sup>47</sup> Where appropriate, the evaluation should pin-point areas where there is potential to reduce inefficiencies, particularly unnecessary regulatory costs, and simplify legislation.
- 2.2. As has previously been acknowledged by a DG Competition official explaining the conclusions of a previous review of the BER, *“The general objective of a block exemption regulation is to provide legal certainty”*.<sup>48</sup> The Consortia BER has proven to be straightforward to apply in practice, as discussed above in section 1. It is clear and well-understood, and has benefitted from amendments in the course of previous reviews which have improved its ease of application. In the review which resulted in the adoption of Commission Regulation 906/2009, the Commission renewed the BER but made a number of amendments which *“revised, simplified and shortened significantly”* the BER by comparison with the previous version.<sup>49</sup> The Commission explained: *“The new Regulation incorporates amendments made necessary by the repeal of the liner conference Block Exemption Regulation in 2006 (see IP/06/1249). It also aims at better reflecting current market practices and bringing the consortia block exemption in line with other block exemption regulations for horizontal cooperation between companies”*.<sup>50</sup> The substantive changes made in 2009 related to (i) the application of the market share threshold, (ii) the definition of consortium, (iii) the list of exempted activities and (iv) the duration of the lock-in notice period.

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<sup>47</sup> Better Regulation Guidelines, p.60.

<sup>48</sup> DG COMP’s Competition policy newsletter 2010-1, *“Commission adopts new block exemption regulation for liner consortia”*, Antje Prisker.

<sup>49</sup> *Ibid.*

<sup>50</sup> [http://europa.eu/rapid/press-release\\_IP-09-1367\\_en.htm](http://europa.eu/rapid/press-release_IP-09-1367_en.htm).

- 2.3. The Commission concluded in its 2014 review that no further changes to the terms of the BER were necessary and re-adopted the Consortia BER without amendment. The Commission noted:

*“After a public consultation, the Commission has concluded that the exemption has worked well, providing legal certainty to agreements which bring benefits to customers and do not unduly distort competition. ... The extension of the exemption until April 2020 will provide legal certainty to liner shipping companies as regards the compatibility of their agreements with EU competition rules”.*<sup>51</sup>

- 2.4. Non-renewal of the BER would undoubtedly reduce legal certainty and increase compliance costs for liner shipping companies.
- 2.5. Without the source of legal certainty provided by the BER if it were allowed to expire, carriers would need to rely on self-assessment, assisted by the general guidance on cooperative arrangements discussed under section 4 below; as will be explained there in more detail, the general guidance is incapable of providing the same *quality of guidance* as the BER because the general guidance does not address the forms of cooperation found in liner shipping consortia.
- 2.6. Moreover, the general guidance referred to by the Commission does not provide the same *level of legal certainty* as the BER because much of it is found in Commission notices and guidelines, which do not have the same legal status as a Commission regulation. Block exemption regulations like the Consortia BER are directly effective and binding on the EU and national courts and the Commission and national competition authorities. By contrast, notices are binding on neither the courts nor national competition authorities. The Court has found:

*“With regard to the Commission notices, one on cooperation within the Network of Competition Authorities [...] and one on immunity from fines and reduction of fines in cartel cases [...] it should be pointed out that those notices are not binding on*

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<sup>51</sup> [http://europa.eu/rapid/press-release\\_IP-14-717\\_en.htm](http://europa.eu/rapid/press-release_IP-14-717_en.htm).

*Member States [...] even if the guidelines set out by the Commission may have some effect on the practice of the national competition authorities, it is, in the absence of binding regulation under European Union law on the subject, for Member States to establish and apply national rules on the right of access, by persons adversely affected by a cartel, to documents relating to leniency procedures”.*<sup>52</sup>

Nor are Commission notices and guidelines binding on the EU Courts

*“[...] the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty [...] It follows that, although those rules, setting out the approach which the Commission proposes to follow, certainly help to ensure that it acts in a manner which is transparent, foreseeable and consistent with legal certainty, they cannot bind the Court”.*<sup>53</sup>

- 2.7. Self-assessment is invariably more complex and less certain than application of a BER, all the more so where there is no case-law precedent or relevant guidance on the form of cooperation governed by the BER. The Specialisation BER<sup>54</sup> and Horizontal Guidelines cannot possibly provide the same degree of legal certainty as the Consortia BER. They are intended to apply to a multitude of industries but do not address the special features of liner shipping consortia or provide any guidance on a range of issues on which the BER provides guidance, such as: the methodology for calculation of market shares, the range of activities permitted within a consortium, the permissible ancillary restrictions, and the permissible lock-in periods. Moreover, without the BER, liner shipping companies would be exposed to a range of factors which would contribute to the length, expense, complexity and uncertainty of a self-assessment, including possible coordinated effects across consortia and the

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<sup>52</sup> *Pfleiderer AG v Bundeskartellamt*, Case C-360/09, EU:C:2011:389, paras. 21 and 23 (emphasis added).

<sup>53</sup> *Italy v Commission*, Case C-310/99, EU:C:2002:143, para. 52 (emphasis added). See also *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09, EU:C:2011:83, Opinion of AG Mazák, footnote 21; and *JCB Service v Commission of the European Communities*, Case C-167/04 P, EU:C:2006:594, Opinion of AG Jacobs, para. 141.

<sup>54</sup> 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 certain categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43–47 (“Specialisation BER”).

interrelationship with the merger control rules applicable to joint ventures. Such assessments would also need to take into account the application of foreign legal regimes to the consortium; whilst that is also true today, the absence of any EU legal regime which provides specific legal protection for consortia would create fragmentation and uncertainty in the international legal order.

- 2.8. Self-assessment would provide less legal certainty than the Consortia BER because it would merely represent the views of the carriers and their advisers. As well as being less authoritative than the BER, self-assessment would also be more expensive and take longer than checking for compliance with the BER. As noted above, the BER is well-understood within the liner shipping industry and straight-forward to apply; for this reason, external advisers are rarely instructed to carry out an assessment of a consortium agreement under the BER. By contrast, external legal advisers are typically engaged, often supported by economists, to undertake self-assessments, which usually take the form of relatively lengthy documents setting out the nature of the arrangement, the factual and market context in which it is intended to operate, any relevant legal guidance on issues such as market definition, competitive dynamics in the relevant sector, and the legal assessment of such arrangements, and the application of such guidance to the arrangement under consideration.
- 2.9. The costs of undertaking a self-assessment are likely to be disproportionately burdensome for smaller companies, which may deter them from participating in consortia. The time involved in conducting a self-assessment, and the potentially indeterminate conclusion of the exercise, may also deter carriers of all sizes from establishing consortia or modifying them in response to changes in market conditions.
- 2.10. For these reasons, the loss of legal certainty that would self-evidently result from expiry of the BER is likely to deter the establishment of efficiency-enhancing cooperation that benefits shippers. This is likely to impact European end consumers in almost all markets.
- 2.11. An additional benefit of renewing the Consortia BER is that it ensures a regulatory level playing field between the EU and other major trading blocs in which the BER is well understood and serves as a useful reference point. Most jurisdictions, including the US, Japan, South Korea, and China, have regulatory systems in place to guarantee that certain

consortia will not be subject to *ex post* antitrust scrutiny, whilst Hong Kong, Singapore, Israel, and Malaysia have adopted block exemptions which confer antitrust immunity on consortia-type arrangements. If the EU were to decide not to confer legal certainty on consortia, carriers whose operations are focused on European trades will be at a competitive disadvantage, and European buyers will suffer a deterioration in service quality and an increase in the costs of supply.

2.12. Conversely, the existence of the BER does not deter other forms of efficient cooperation: as will be explained in the next section, consortia remain the predominant form of cooperation in liner shipping.

3. **Relevance:** *is the Consortia BER still relevant considering the major developments in the industry and the modes of cooperation between carriers? Is the Consortia BER relevant compared to other instruments that provide guidance on the interpretation of Article 101 TFEU to cooperation agreements (for example: the Horizontal Guidelines, Article 101(3) Guidelines, the Specialisation BER and EC decisional practice)?*

#### Predominance of consortia

3.1. Consortia remain the predominant form of cooperation in the liner shipping industry. There are numerous consortia operating on multiple trades to and from the EU. The Annex to the RBB Report provides an overview of the consortia operating on certain European trades, from which it is apparent that there are 61 vessel sharing arrangements outside the big 3 alliances and at least an additional 57 services with slot agreements with third parties in place operating on the European trades covered by RBB's analysis; all of those arrangements for which capacity data is available are below the 30% market share threshold in the Consortia BER.<sup>55</sup>

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<sup>55</sup> As noted in the RBB Report, although the market share threshold of the BER is based on volume market shares, the RBB Report uses capacity market shares because: data was not available at a sufficiently granular level to calculate volume market shares; and the Alphaliner database, relied on by RBB, provides capacity data in real time whereas volume data is necessarily delayed.

- 3.2. Assuming that these numerous consortia satisfy the conditions of the Consortia BER, each will be generating efficiencies of the kind identified in Regulation 246/2009 and the Consortia BER itself for shippers serving Europe and for consumers in Europe. Any analysis of the effectiveness and relevance of the Consortia BER needs to acknowledge its impact on these numerous consortia and the harm that could be caused to European shippers and consumers if the Consortia BER were not renewed.
- 3.3. As the RBB Report shows, there is a large number and a large variety of cooperation agreements between carriers on European trades. This not only includes cooperation between the larger carriers but also between smaller and larger carriers. For example, cooperation on trade between Europe and Africa includes services offered by smaller carriers such as Arkas (Turkey), NileDutch (the Netherlands), Marguisa Lines (Spain) and Messina Lines (Italy) through cooperation agreements with larger carriers such as CMA CGM, COSCO and Hapag Lloyd.
- 3.4. The BER is a source of legal certainty for the numerous consortia that operate in EU trades (as well as for the three major alliances, whether or not they fall within its terms). Within a given consortium, it allows the smaller lines to benefit from the network and assets of the larger carriers, whilst the larger carriers are likely to benefit at the same time from the specialised and focussed services of the smaller carriers.
- 3.5. The generic guidance cited by the Commission is of little if any practical value. As explained further in section 4 below, the Horizontal Guidelines, Article 101(3) Guidelines and Specialisation BER do not address the forms of cooperation found in consortia. There is no relevant EC decisional practice because the Commission and EU courts have never taken any decision on consortia or other analogous arrangements. As explained above in section 2, self-assessment based on these instruments would be a lengthy and complex exercise: because self-assessment would not provide the same level of legal certainty at the same low cost and ease of application as the BER, at least some carriers would be deterred from entering into efficiency-enhancing consortia or amending such arrangements. This is likely to affect smaller carriers more than large ones, and smaller consortia more than large ones.

### The formation of the 3 major alliances

- 3.6. The formation of the 3 major alliances (2M, THE, Ocean) does not alter the relevance of consortia as a means of efficiency-enhancing cooperation, or the relevance of the BER to such arrangements. As noted above, there is a vast number of consortia operating on European trades: the evaluation of the Consortia BER should not be based on or distorted by the 3 major alliances.
- 3.7. Indeed, the major alliances are not a new or different form of cooperation: they are merely larger consortia operating on more than one trade – but the basic elements of these alliances are no different than in traditional consortia, and the nature of the cooperation – namely, the sharing of vessel capacity in order to achieve economies of scale and scope – is the same in the three major alliances as in other consortia. The RBB Report provides a comparison of the three major alliances which operated in 2006 with those operating today (section 3.3): although individual members have consolidated, and the composition of the alliances has changed, the fact remains that three major alliances were present in 2006 and three major alliances are present today.
- 3.8. Moreover, it cannot be assumed that the three major alliances do not satisfy the conditions of the BER. On the two biggest east-west trade lanes touching Europe, four of the six alliance/trade-lane pairs were under the 30% threshold in October 2018, according to Alphaliner. Specifically, the largest alliances had market shares of 35.8% (2M), 36% (Ocean), and 25.5% (THE) on the Far East-Europe trade; and 25.9% (2M), 13.3% (Ocean), and 20.1% (THE) on the Europe-North America trade. (See RBB Report, Table 1; market shares based on capacity.)

### Industry consolidation

- 3.9. Consolidation in liner shipping has not undermined the Consortia BER. As explained above, the market remains “rather fragmented” and is not close to a point where even the leading companies could maintain their level of service individually on all trades. As the RBB Report shows, despite recent consolidation resulting from mergers and acquisitions, the level

of concentration in the industry at the global level remains relatively low (below 1000 on the basis of global capacity shares).

- 3.10. In fact, the increase in high capacity vessels has made the Consortia BER more relevant than ever, as consortia provide the most effective means of enabling carriers to maximise the efficiencies that can be achieved by large vessels.
- 3.11. Nor has consolidation increased consortia market shares to the point that the BER is redundant. As noted above, the majority of consortia fall within the BER's market share threshold.

Alternative modes of cooperation?

- 3.12. When the Commission concluded that the liner conference block exemption should be repealed, it laid weight on the fact that less restrictive alternatives to conference price fixing that assure reliable services already existed in the form of service contracts and consortia.<sup>56</sup> Similarly, when the Commission decided not to renew the Insurance BER exemption for pooling agreements, it noted that alternative forms of cooperation that “play a similar role” already existed.<sup>57</sup>
- 3.13. There is no alternative form of cooperation in the liner shipping industry that is capable of achieving the same welfare benefits as consortia which has either evolved through industry practice or which is less restrictive of competition. For example, establishing a joint venture is much more complex from a regulatory perspective and it does not offer the same flexibility as a consortium; it also does not allow for the same degree of competition between the parties as a consortium.

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<sup>56</sup> See Commission Discussion Paper on the Review of Regulation 4056/86, para 3, and Commission White Paper COM (2004) 675 at

[http://ec.europa.eu/competition/consultations/2005\\_reg\\_4056\\_86/index.html#130705](http://ec.europa.eu/competition/consultations/2005_reg_4056_86/index.html#130705)

<sup>57</sup> IBER report, para 41.

4. **Coherence:** *Is the Consortia BER coherent with other instruments that provide guidance on the interpretation of Article 101 TFEU (for example: the Horizontal Guidelines, Article 101(3) Guidelines, the Specialisation BER and EC decisional practice)?*
- 4.1. According to the Commission’s Better Regulation Guidelines,<sup>58</sup> the Commission must consider two questions when evaluating coherence. First, it must consider whether its intervention is internally coherent. This means, for example, ensuring that provisions in a legislative act are consistent with one another.<sup>59</sup> Second, the Commission must consider whether its intervention is externally coherent. For instance, the Commission must check how its intervention operates alongside other EU policy initiatives, either in the same policy field, or in other related areas.<sup>60</sup>
- 4.2. The coherence question included in the Roadmap<sup>61</sup> does not seek to address whether the Consortia BER is internally or externally coherent. In fact, the question is illusory: it essentially asks whether a sector-specific rule is consistent with a policy of abolishing sector-specific rules. Obviously, the answer to this question is no.
- 4.3. However, when the correct questions are asked – namely, would a renewal of the Consortia BER be internally and externally coherent – the answer is a definitive yes, for the reasons explained below.

#### Internal coherence

- 4.4. The Better Regulation Toolbox explains that checking internal coherence means “looking at how the various components of the same EU intervention operate together to achieve its objectives, e.g., the different articles of a piece of legislation, different actions under an action plan”.<sup>62</sup> In the present case, the “EU intervention” at issue is the Consortia BER,

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<sup>58</sup> See Better Regulation Guidelines, pages 52, 62-63.

<sup>59</sup> Better Regulation ToolBox, Tool #47, page 352; Better Regulation Guidelines, page 63.

<sup>60</sup> Better Regulation ToolBox, Tool #47, page 352; Better Regulation Guidelines, page 63.

<sup>61</sup> “*Is the Consortia BER coherent with the general policy of harmonising competition rules and replacing sector-specific rules with measures (BERs or guidelines) providing general guidance on the application of Article 101 TFEU?*”

<sup>62</sup> Better Regulation ToolBox, Tool #47, page 352.

meaning that the assessment of internal coherence merely requires that the provisions within the Consortia BER operate harmoniously to achieve its objectives.

- 4.5. For the reasons explained throughout this submission, the Consortia BER is operating effectively and is not vitiated by any internal inconsistencies that would compromise the attainment of its objectives. This is also evident in the fact that the Commission has seen fit to renew the Consortia BER repeatedly (subject to the amendments noted above). If any internal incoherence existed, it would have been identified and remedied prior to the current evaluation. Accordingly, unless the Commission has evidence to the contrary, the criterion of internal coherence is satisfied.

#### External coherence

- 4.6. The Better Regulation Toolbox explains that checking for external coherence requires an assessment of “other (“external”) interventions, at different levels: for example, between interventions within the same policy field (e.g., a specific intervention on drinking water and wider EU water policy) or in areas which may have to work together (e.g., water policy and chemicals policy, or chemicals and health and safety). At its widest, external coherence can look at compliance with national policies or international agreements/declarations (for example EU labour market interventions might be looking into coherence with ILO conventions) or EU interventions in developing countries”.<sup>63</sup>
- 4.7. Based on this guidance, the Commission should consider – at a minimum – the following three issues. First, whether a renewal of the Consortia BER is coherent with EU competition policy. Second, whether a renewal of the Consortia BER is coherent with EU maritime policies. Third, whether a renewal of the Consortia BER is coherent with EU environmental policy. As explained below, renewing the Consortia BER is coherent with all of these policies.

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<sup>63</sup> Better Regulation ToolBox, Tool #47, page 352.

### Coherence with EU competition policy

- 4.8. The Commission has previously found that the general policy of harmonising competition rules is only an appropriate justification for removing sector-specific block exemptions if there is already equivalent Commission guidance in place to self-assess the specific form of cooperation in the sector in question.<sup>64</sup> Removing a block exemption is not appropriate if it would lead to a disproportionately costly competition law assessment.<sup>65</sup>
- 4.9. The peculiar features of liner shipping consortia mean that the general guidance in the Horizontal Guidelines, Article 101(3) Guidelines, and Specialisation BER do not offer self-assessment guidance equivalent to the Consortia BER. In the absence of equivalent guidance, a decision not to renew the Consortia BER would be inconsistent with EU competition policy.

### *The Horizontal Guidelines are not sufficient*

- 4.10. While section four of the Horizontal Guidelines addresses 'Production Agreements', it dedicates only four paragraphs to their assessment under Article 101(3) TFEU. Those paragraphs are of an entirely general nature,<sup>66</sup> and the examples provided bear no relationship to the kinds of cooperation found in consortia.<sup>67</sup> The guidance focuses on situations where one or both parties to an agreement have given up their individual means of production. For instance, Example 1<sup>68</sup> involves an industry in which production costs are a major part of variable costs and the parties have abandoned their individual production plants to open a joint production plant. This example is not applicable to liner shipping consortia. In a typical consortium, the parties maintain their own vessel production (by purchasing or chartering ships) and retain capital and operating cost responsibility for their individual ships. In other words, unlike Example 1, there is no commonality of a major variable cost; vessel costs, which are the predominant costs in the industry, are separately maintained by each party to the consortium.

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<sup>64</sup> IBER report, para 31.

<sup>65</sup> IBER Working Document, para 127.

<sup>66</sup> Horizontal Guidelines, paras 183-6.

<sup>67</sup> Horizontal Guidelines, paras 187-193.

<sup>68</sup> Horizontal Guidelines, para. 187.

4.11. By contrast, the Horizontal Guidelines extensively address the application of Article 101(3) to information exchanges and note their applicability to the insurance sector in particular.<sup>69</sup> The Commission explicitly commented on this when determining that the Insurance BER was unnecessary because the Horizontal Guidelines provided sufficient guidance to self-assess without disproportionately increasing compliance costs.<sup>70</sup> The Commission also noted that the *lack of* specific advice on information exchanges in the 2001 version of the Horizontal Guidelines justified its earlier decision to *renew* the Insurance BER.<sup>71</sup>

*The Article 101(3) Guidelines are not sufficient*

4.12. By their very nature, the 101(3) Guidelines are only of general application. They must be applied “*reasonably and flexibly*” according to “*the circumstances specific to each case*”.<sup>72</sup> They cannot be considered equivalent to the Consortia BER, which applies to the specific forms of cooperation unique to liner shipping.<sup>73</sup>

4.13. Under the 101(3) Guidelines, self-assessment of cost efficiencies requires the undertakings to “*calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed*”.<sup>74</sup> This rigorous self-assessment by every member of every consortium would be inappropriate for arrangements that are wide-spread and manifestly beneficial to consumers, and would dramatically increase compliance costs.

4.14. Similarly, the 101(3) Guidelines state that market shares are not considered sufficient to prove that competition has not been eliminated. The assessment must also include consideration of the capacity of actual competitors to compete and their incentive to do so.<sup>75</sup> Again, this cannot be considered equivalent to the clarity provided by the bright line rules in the Consortia BER and would lead to a disproportionate increase in compliance costs.<sup>76</sup>

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<sup>69</sup> Horizontal Guidelines, para 97.

<sup>70</sup> See IBER report, paras 28-30; and IBER Working Document, para 104, 127.

<sup>71</sup> IBER Working Document, para 69.

<sup>72</sup> Guidelines on the application of Article 101(3) of the Treaty, *OJ C* 101, 27.4.2004, p. 97–118 (“101(3) Guidelines”), para 6.

<sup>73</sup> Consortia BER, Article 3.

<sup>74</sup> 101(3) Guidelines, para 56.

<sup>75</sup> 101(3) Guidelines, para 109.

<sup>76</sup> See Consortia BER, recital 9.

- 4.15. The 101(3) Guidelines are even more general than the Horizontal Guidelines, which provide specific advice on certain types of horizontal agreements (albeit, not consortia). In this regard, it is telling that the Commission did not even argue that the 101(3) Guidelines provided a sufficient basis to self-assess in the insurance sector.<sup>77</sup>

*The Specialisation Block Exemption Regulation is not sufficient*

- 4.16. While the Specialisation BER does apply to the joint supply of services, it would not block exempt many arrangements to which the Consortia BER currently applies or provide the same level of specificity, and thus legal certainty, as the Consortia BER. Unlike the Specialisation BER, the Consortia BER specifically defines the forms of cooperation between liner shipping companies that benefit from the BER and itemises the range of cooperative activities,<sup>78</sup> the ancillary restrictions,<sup>79</sup> and the maximum notice periods<sup>80</sup> which are compatible with Article 101(3). This provides guidance and legal certainty which is wholly absent in the Specialisation BER. In particular, the rules related to “joint production agreements”, as described in the Specialisation BER, are ill-suited to services in general and especially unsuitable for consortia. Trying to apply those rules to a consortium is an abstract exercise that provides no practical assistance to liner shipping companies.
- 4.17. Moreover, the market share threshold in the Specialisation BER is markedly lower than that in the Consortia BER: 20% and 30%, respectively.<sup>81</sup> The lower 20% threshold is particularly problematic because a consortium's market share is determined by combining the market share of all the consortium's members inside and outside the consortium in the relevant market.<sup>82</sup> A threshold of 20% would significantly reduce the number of consortia which could benefit from block exemption and increase the number which fall for self-assessment,

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<sup>77</sup> IBER report and IBER Working Document.

<sup>78</sup> See Article 3(1)-(3) of the Consortia BER.

<sup>79</sup> See Article 3(4) of the Consortia BER.

<sup>80</sup> See Article 6 of the Consortia BER.

<sup>81</sup> Specialisation BER, Article 3; and Consortia BER, Article 5. The Specialisation BER and Consortia BER also have different grace periods in the event that their respective market shares are exceeded: see Article 5 of each Regulation.

<sup>82</sup> Consortia BER, recital 10.

whilst also depriving them of the consortia-specific guidance that the Consortia BER provides.

- 4.18. Accordingly, the Specialisation BER does not provide an equivalent degree of guidance, protection or legal certainty as the Consortia BER.

*Conclusion on coherence with EU competition policy*

- 4.19. As explained above, neither the Horizontal Guidelines, nor the Article 101(3) Guidelines, nor the Specialisation BER provide guidance – let alone legal certainty – equivalent to the Consortia BER. For this reason, a decision not to renew the Consortia BER would create a chasm in the legislative landscape, leading to increased compliance costs and ultimately eradicating significant consumer and industry benefits. Such a decision would be blatantly averse to EU competition policy. Renewal of the Consortia BER, on the other hand, furthers – and is therefore undoubtedly coherent with – EU competition policy, for the reasons discussed extensively throughout this submission.

Coherence with EU maritime policy

- 4.20. With respect to maritime policies more generally, the Consortia BER contributes to the attainment of several key EU objectives. The list below, which is non-exhaustive, briefly explains those objectives and how the Consortia BER contributes to their attainment.

- 4.20.1. ***Maintaining competitiveness.*** Both the Commission,<sup>83</sup> and the Council of the EU<sup>84</sup> have proclaimed that enhanced logistical coordination between shipping companies is vital to ensure that the EU shipping industry remains competitive on the global stage. As explained, the Consortia BER facilitates logistical coordination by providing a reliable legal framework for cooperation through consortia. It therefore directly advances the EU policy objective of maintaining the competitiveness of the EU shipping industry.

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<sup>83</sup> Commission Staff Working Document on the implementation of the EU Maritime Transport Strategy 2009-2018, 30 September 2016, SWD(2016) 326, para. 5 (“Maritime Strategy”).

<sup>84</sup> See Regulation 246/2009, recitals 4-5.

4.20.2. ***Social agenda and jobs.*** The Commission wants to “create/foster employment of European seafarers”<sup>85</sup> and accepts that “[a]n attractive framework for quality shipping and quality operators” contributes to the achievement of this objective.<sup>86</sup> For the reasons already explained, the Consortia BER provides legal certainty for shipping companies, not only for their continued operations, but also for investment decisions which are integral to job creation. The Consortia BER is therefore consistent with the EU’s social agenda and job stimulation policies in the maritime sector.

4.20.3. ***New markets.*** The Commission has stated that “the presence of the EU shipping industries in new markets [*i.e.*, emerging economics] must be encouraged and supported”.<sup>87</sup> By providing a reliable framework for entering into cooperation agreements, the Consortia BER encourages and supports shipping companies to grow and expand their operations to emerging economies.

4.21. As noted, the above list of objectives is not, nor is it intended to be, exhaustive. Nonetheless, it shows that the Consortia BER is currently helping the EU to achieve multiple EU maritime policy objectives. A failure to renew the Consortia BER would frustrate these (and possibly many other) EU maritime policy goals.

#### Coherence with EU environmental policy

4.22. The Consortia BER has an important role to play in furthering EU environmental policy, specifically the EU’s policy objective “to achieve levels of air quality that do not give rise to significant negative impacts on, and risks to, human health and the environment”.<sup>88</sup> The Commission has not considered this objective in its previous BER reviews, but recent

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<sup>85</sup> See [https://ec.europa.eu/transport/modes/maritime/seafarers\\_en](https://ec.europa.eu/transport/modes/maritime/seafarers_en).

<sup>86</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategic goals and recommendations for the EU’s maritime transport policy until 2018, 21 January 2009, COM(2009) 8, page 3.

<sup>87</sup> Maritime Strategy, para. 8.

<sup>88</sup> Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels, OJL 132, 21.5.2016, p. 58–78, recital 2 (“Sulphur Directive”).

regulatory changes, with rapidly approaching implementation dates, require such consideration in this review cycle.

- 4.23. Two types of air emissions are particularly relevant to liner shipping: sulphur oxide (“SOx”) emissions and greenhouse gas emissions (“GHGs”).
- 4.24. **SOx:** Sulphur oxide emissions have come under stricter regulation at both EU level and at the level of the International Maritime Organization (“IMO”), with substantially stricter regulations coming into force at virtually the same time as the expiration date of the current BER. The Sulphur Directive establishes Emission Control Areas (“ECAs”), in which, from 2015, the maximum permitted marine fuel sulphur content is 0.1%. Beginning on 1 January 2020, under both the EU Directive and the globally applicable Annex VI to MARPOL<sup>89</sup> (agreed through the International Maritime Organization), the global marine fuel sulphur cap will drop from 3.5% to 0.5%.
- 4.25. Low-end estimates suggest fuel cost increases for the liner shipping sector alone in excess of USD 10 billion per year over current levels until and unless the price differential between lower sulphur fuel and current fuels moderates. That amount is well in excess of the total profit for the liner shipping industry for 2017 (estimated at USD 6-7 billion), which itself was one of the few profitable years in recent history. The magnitude of the projected cost increase for fuel will be felt throughout the international ocean transportation supply chain. In order to maintain adequate service levels and minimize the impact of these additional costs, carriers will use every tool available to move cargo most efficiently so as to reduce fuel consumption. The BER supports and facilitates vessel sharing, which is one of the primary means by which liner shipping companies maximize operational efficiency. Non-renewal of the BER would reduce the availability of that efficiency-enhancing tool at a time when increased efficiency is critical for better environmental performance while carriers simultaneously seek to reduce the cost – to both shippers and carriers – of that improved performance.

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<sup>89</sup> International Convention for the Prevention of Pollution from Ships.

4.26. **GHGs:** In April 2018, at the 72nd meeting of the IMO Marine Environment Protection Committee (MEPC 72), the Committee, with the vocal support of the EU Member States, adopted an “Initial Strategy” for the reduction of greenhouse gas emissions from international shipping. Resolution MEPC.304(72), among other goals, set a target of reducing GHG emissions from international shipping by 50% in 2050 compared to 2008. Meeting that goal will require development of new fuels and new propulsion technologies, but it will also require that carriers achieve the maximum efficiency from their existing ships. As is the case with minimizing the cost associated with SOx regulation, discussed above, vessel sharing is a key tool for reducing fuel burn and associated greenhouse gases. The BER facilitates that vessel sharing activity and its contribution to better fleet utilization is especially critical now as the liner shipping industry adds environmental improvement to its list of reasons to maximize efficiency.

#### Conclusion on coherence

4.27. As noted in the Better Regulation Guidelines, “[n]o policy exists in a vacuum [...] small changes in how one intervention is designed or implemented can trigger improvements or inconsistencies with other ongoing actions”.<sup>90</sup> For the reasons set out above, renewal of the Consortia BER is coherent with EU interventions both “internally” and “externally” whereas non-renewal of the Consortia BER would frustrate (*i.e.*, be incoherent with) EU competition policy, EU maritime policies, and EU environmental policy.

5. **EU added value:** *Does the Consortia BER have added value in the assessment of the compatibility of consortia with Article 101 TFEU compared to, in its absence, self-assessment based on other instruments that provide guidance on the interpretation of Article 101 TFEU?*

5.1. The Commission’s Roadmap and consultation paper incorrectly address the value added criterion by considering the added value of the Consortia BER over other Commission measures, such as the Horizontal guidelines and Article 101(3) guidelines.<sup>91</sup> The EU added

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<sup>90</sup> Better Regulation Guidelines, p.62.

<sup>91</sup> Roadmap, p.2.

value evaluation should consider the value resulting from EU action that is additional to the value that would have resulted from intervention at *regional or national* level by public authorities and the private sector.<sup>92</sup>

- 5.2. The benefits of the Consortia BER could not be achieved at a national level. Consortia are broadly homogenous arrangements which do not display any specific national and regional features. They are typically designed to serve multiple ports in regions comprising several countries; for example, a consortium serving Northern continental Europe will typically call at ports in Germany, Netherlands, Belgium and France, or some combination of these countries. This is reflected in the way that liner shipping markets have been consistently defined by the Commission on the basis of trade routes serving regions composed of multiple EU member states (such as Northern and Mediterranean Europe).
- 5.3. Only the EU institutions are empowered to issue block exemptions on the application of Article 101 TFEU.<sup>93</sup> If EU member states were to adopt national measures on the application of Article 101 and national competition law to consortia, this would make the legal assessment of consortia a far more uncertain, complex, lengthy and costly exercise than it is at present. Liner shipping companies would be confronted with a patchwork of different and possibly inconsistent legal regimes, any number of which would be applicable to a single consortium; carriers would need to instruct multiple advisers to advise on these different regimes; and the scope for uncertainty and conflict which currently exists as between the EU and foreign legal regimes at the other end of international trades would be replicated and multiplied within the EU itself. As explained in section 2 above, the Commission's general guidance on Article 101 would not prevent such conflict because it is not binding on Member States.
- 5.4. In this regard, it is important to note the significant influence the Consortia BER has had on other jurisdictions when they have deliberated on the proper regulation of consortia under their own antitrust laws. By providing a model which has been widely followed internationally, the Consortia BER has mitigated the scope for inconsistent treatment of

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<sup>92</sup> Better Regulation Guidelines, p.63.

<sup>93</sup> Article 103 TFEU.

consortia, and contributed to international comity and the intellectual leadership of the EU in the international antitrust community. In the absence of the BER, it is inconceivable that member state measures on consortia would be capable of making the same contribution to the international legal order. On the contrary, as noted above, the opposite is likely to occur.

- 5.5. For these reasons, the Consortia BER is manifestly superior to any measure that might be adopted at national level.

#### **D. Conclusion**

The present submission has shown that the case in favour of renewing the BER is overwhelming. The original rationale for the BER – namely, the promotion of efficiency-enhancing operational cooperation – is as relevant today as ever, and it is especially important to smaller and medium sized shipping companies and the numerous consortia operating outside the big 3 alliances.

While the industry has experienced some consolidation in recent times, it remains fiercely competitive and is far from concentrated. This is demonstrated in the detailed economic report annexed to this submission (Annex 1), which also shows that the benefits of consortia have been passed on to consumers. On that point, we have also shown that arguments against the renewal of the BER, reflected in the ITF report, are deeply flawed (Annex 2).

As for the Commission’s policy against sector-specific guidelines, this policy objective should not be given undue importance; nor should it be allowed to prejudge the outcome of the Commission’s evaluation. The Commission must give due weight to the Council’s policy objectives reflected in Regulation 246/2009 (which would be furthered by renewal of the BER) and the five evaluation criteria laid down in the Better Regulation Guidelines.

As demonstrated, all five criteria support the renewal of the BER. First, the BER is effective because it promotes and facilitates economically efficient cooperation, to the benefit of consumers, and provides legal certainty. Second, the BER enhances efficiency because it is well understood and less complex (and less costly) to apply in practice than self-assessment; it also generates efficiencies by creating a regulatory level-playing field between the EU and other major trading blocs. Third, because it provides maximum legal certainty for the numerous consortia operating on EU trades, the BER is relevant; there is no alternative form of cooperation in the industry that

is capable of achieving the same welfare benefits as consortia. Fourth, the BER is coherent, both internally and externally. Renewal of the BER is consistent with EU competition policy, EU maritime policies, and EU environmental policy, whereas non-renewal would frustrate those policies. Finally, the BER has EU added value because the benefits of the BER could not be achieved at a national level; moreover, the BER ensures that liner shipping companies are not confronted with a patchwork of different, and possibly inconsistent, legal regimes across Member States.

In conclusion, the BER should be renewed for a further five years. Renewal will yield significant benefits on multiple fronts – especially for consumers – whereas non-renewal would impede efficiency-enhancing cooperation, contrary to consumer welfare.

WSC, ECSA, ICS and ASA look forward to a constructive dialogue with the Commission on the renewal of the BER and would be happy to answer any questions that the Commission might have on the present submission.

## SCHEDULE OF ANNEXES

1. Report by RBB Economics, 19 December 2018, *Response to the EC liner shipping BER consultation*
2. Comments on International Transport Forum (ITF) report entitled “*The Impact of Alliances in Container Shipping*”

**Annex 1**

**Report by RBB Economics of 19 December 2018, “*Response to the EC liner shipping BER consultation*”**

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# Response to the EC liner shipping BER consultation

Prepared at the request of the World Shipping Council

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RBB Economics, 19 December 2018

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# 1 Introduction

The Consortia Block Exemption Regulation (BER) provides a safe harbour for cooperation between firms in the liner shipping sector that offer regular, scheduled maritime cargo transport services on a specific route. If cooperation between carriers that offer such liner shipping services meet the conditions set out in the BER, the agreement to cooperate does not infringe Article 101 TFEU.

The Consortia BER will expire on 25 April 2020. The European Commission is evaluating whether the Consortia BER is still relevant and delivering on its objectives in a coherent, effective and efficient manner. On the basis of this evaluation the European Commission may decide to extend the period of application of the Consortia BER, or to repeal it by letting it expire.

The World Shipping Council (WSC) is a trade association representing the liner shipping sector. The members of the WSC represent 90% of global liner vessel capacity. The WSC has asked RBB Economics to provide its economic assessment of the consortia BER in the context of the evaluation by the European Commission.

## **2 The Consortia Block Exemption Regulation**

### **2.1 Scope of the Consortia BER**

The Consortia BER applies to agreements between liner shipping companies that allow the participants to such agreements to operate a joint international liner shipping service to or from one or more ports in the European Union.

As indicated in the Consortia BER, the exact legal form of the cooperation is less relevant than the underlying economic reality that the parties to the agreement provide a joint service. The Consortia BER in principle covers a broad range of agreements ranging from highly integrated types of cooperation that require significant investments to flexible slot exchange agreements.

The Consortia BER only applies if the combined market share of the parties to a consortium agreement does not exceed 30% on the relevant market affected by the agreement. If this market share threshold is exceeded, the Consortia BER does not apply. However, this does not imply that the agreement can be assumed to restrict competition, i.e. there is no presumption of illegality in relation to agreements that fall outside of the Consortia BER.

The Consortia BER does not apply to consortium agreements that contain hard-core competition law infringements, i.e. consortium agreements that would result in price fixing, market sharing, or the limitation of capacity or sales (other than capacity adjustments within the consortium to respond to fluctuations in demand or supply).

### **2.2 Purpose of the Consortia BER**

The Consortia BER aims to facilitate cooperation between liner shipping companies that helps to improve the productivity and quality of available services. The joint operation of services allows for economies of scale in the operation of vessels and the utilisation of port facilities. It facilitates and encourages a greater utilisation of containers and a more efficient use of vessel capacity.

Users may also benefit through improvements in the frequency of sailings and port calls and better services through the use of more modern vessels, equipment and port facilities.

The Commission considers that users of shipping services provided by consortia may benefit from these productivity and other improvements, provided that there is sufficient competition in the markets in which the consortia operate.

### **2.3 Evaluation of the Consortia BER**

In the Evaluation Roadmap, the Commission mentions, as a relevant development to consider in the context of the evaluation, that the liner shipping industry has experienced significant consolidation with some carriers exiting the market whilst others have merged and/or cooperate in increasingly larger consortia. According to the Commission, this may call into question the

continued relevance of the Consortia BER, and whether or not the Consortia BER still facilitates economically efficient cooperation to the benefit of consumers.

More generally, the European Commission will in its evaluation apply the criteria of effectiveness, efficiency, relevance, coherence and EU added value when considering whether to extend or repeal the Consortia BER.

## **2.4 Scope of this report**

In this report we will focus on the effectiveness and relevance of the Consortia BER: does the Consortia BER still facilitate economically efficient cooperation that also benefits consumers, in the context of the major developments in the industry and the existing modes of cooperation between carriers?

The other criteria that will be applied are more legal in nature, and relate primarily to the question whether the BER as a legal instrument is efficient, coherent with general policies and of added value. As these criteria are more general in nature, RBB Economics is not best placed to comment on these. We would nevertheless note that in our view substance should trump form: if it would be concluded that the Consortia BER continues to be effective and relevant, it does not in our view make sense to let it expire only because the Commission may, for example, generally prefer not to maintain sector specific competition rules.

In Section 3 of this report we will assess the structure of the market, reflecting on the consolidation that has taken place, and review, in this context, the extent of cooperation within the scope of the Consortia BER that continues to be present in the market. We will also comment on the impact of recent market developments on competition, and hence on the question whether any benefits from cooperation in the industry have likely been passed on to customers or not.

In Section 4 of this report, we will assess the nature of competition in the market for liner shipping services and look at the development of prices over time, the profitability of market players as well as the level of concentration.

Section 5 provides our observations on some of the commentary that we have seen in the context of the evaluation of the Consortia BER.

## **3 Evolving market structure, consolidation and cooperation in the liner shipping sector**

### **3.1 Introduction**

The liner shipping industry has experienced two clear trends which have had an important impact on market structure: consolidation and the formation of large alliances on the main East-West trade lanes. These two trends are not independent as consolidation has also impacted on the cooperation between shipping lines. Consolidation has resulted in rearrangement of pre-existing cooperation agreements as a result of decisions made by the liner shipping firms. At the same time, merger control procedures, including those before the European Commission, have also resulted in changes to existing cooperation agreements: in cases where mergers would have resulted in the merged entity being a member of two consortia in the same market, the Commission typically required the merging parties to commit to leave one of those as a condition for approval.

In short, the market has experienced a period of significant structural change in the last few years.

### **3.2 Consolidation**

Notable recent events that have contributed to consolidation in the sector include:

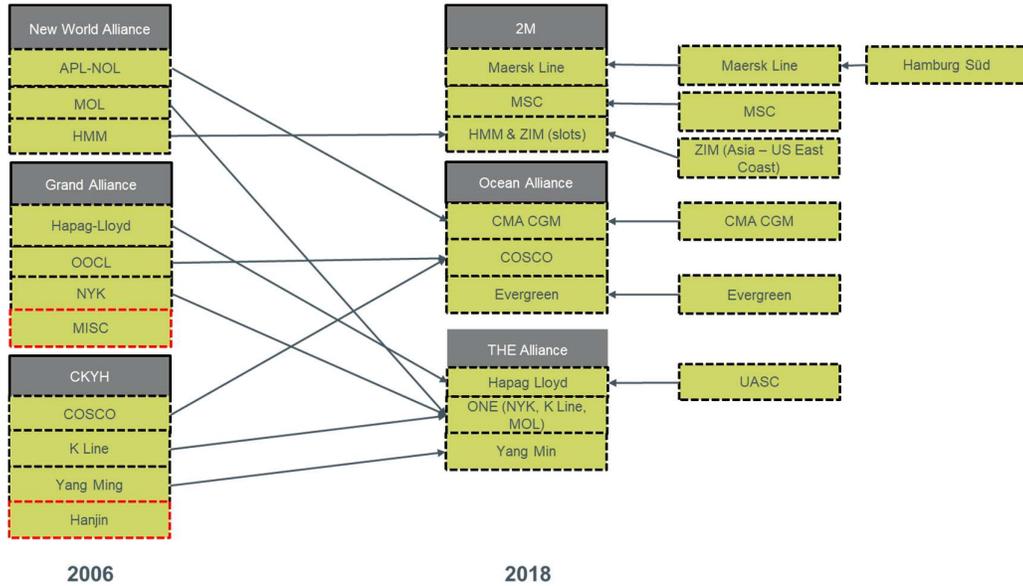
- The acquisition of APL-NOL by CMA CGM (2016);
- The acquisition of United Arab Shipping Company (UASC) by Hapag Lloyd in (2016);
- The market exit of Hanjin Shipping (2016);
- The acquisition of Hamburg Süd by Maersk Line (2017);
- The formation of the ONE joint venture combining the activities of NYK, MOL and K Line (2017);
- The acquisition of OOCL by COSCO (2017).

These events have (1) reduced the number of independent carriers active in the market globally, and (2) have resulted in increased market shares of the remaining firms on the relevant liner shipping markets (typically defined as liner shipping services on trades between two regions, or liner shipping services within a region).

### **3.3 Large alliances**

As a result of reshuffling and consolidation, the market has experienced important shifts in the composition of the major alliances that cover the main East-West trade routes (Asia-Europe, Europe-US and US-Asia). The figure below compares the big three East-West alliances in 2006 and the situation at present.

**Figure 1: Composition of the large East-West alliances in 2006 and 2018**



Source: RBB

The left hand side of the above figure shows the membership of the large East-West alliances in 2006. The arrows show to which alliance the relevant carriers have moved. This includes movements resulting from mergers and acquisitions. For example, APL-NOL has been acquired by CMA CGM, which is part of the Ocean Alliance. The right hand side shows the carriers that were not part of the large alliances in 2006, but are part of the larger alliances today. It is clear that some of the largest carriers have joined the large alliances since 2006. This has allowed those carriers access to the scale required to deploy ultra-large vessels.

Finally, Hanjin and MISC are marked in red, as these firms have exited the container shipping market since 2006. MISC has withdrawn from the market for container shipping services in 2010. Hanjin Shipping went bankrupt in 2016.

### 3.4 Cooperation outside the large alliances

For the purposes of evaluating the relevance of the BER, we have assessed the extent of cooperation between carriers on routes that cover European ports, including intra-European (i.e. shipping services between European ports).

In particular for the purposes of the evaluation of the BER, it is relevant to note that the big alliances only cover the main East-West trades. They do not cover North-South trades, do not cover cooperation between carriers within regions, including Europe, and do not include all cooperation between carriers on the East-West routes.

In the Annex to this report, we have included tables providing a comprehensive overview of cooperation between carriers in place as of early November 2018 with indicative capacity shares for the major trade lanes. The extent of cooperation outside of the big three alliances

is noteworthy. We estimate that there are 61 VSAs outside the big 3 alliances and at least an additional 57 services with slot agreements with third parties in place.

These overviews should be interpreted with caution, as also explained in the Annex. Nevertheless, they clearly show that (a) there is significant cooperation within the industry outside of the big East-West alliances and (b) as is also clear from the tables, it is highly likely that the large majority of these cooperation agreements do not exceed the market share threshold of the BER.

This can be illustrated with the shares of the large alliances as the ‘extreme’ case. The Asia to Europe trade is often considered as an example of the trade that is most prominently impacted by the formation of the big alliances, resulting in the highest level of concentration, if market shares would be attributed to alliances rather than carriers. The table below shows that two of the three alliances exceed, with their combined capacity, the 30% threshold. At the same time however, neither of the large alliances exceed the threshold on the Europe – North America trade.<sup>1</sup>

**Table 1: Capacity shares large alliances October 2018**

Alliance	Europe – North America	Far East -Europe
2M	25.9%	35.8%
Ocean Alliance	13.3%	36.0%
THE Alliance	20.1%	25.5%

Source: Alphaliner

Other trades are much less concentrated. The tables in the annexes show a large number and a large variety of cooperation agreements between carriers on all trade lanes relevant for the evaluation of the BER.

This includes not only cooperation between the larger carriers but also between smaller and larger carriers. As the extreme cases shown above (the large alliances) have market shares up to around 35%, the large majority of cooperation, i.e. cooperation agreements outside of the large alliances is likely to benefit from the BER.<sup>2</sup>

For example, cooperation on trade between Europe and Africa includes services offered by smaller carriers such as Arkas (Turkey), NileDutch (the Netherlands), Marguisa Lines (Spain) and Messina Lines (Italy) through cooperation agreements with larger carriers such as CMA CGM, COSCO and Hapag Lloyd.

The broad variety of cooperation between shipping lines is also clear when looking at intra-European shipping services. Here it appears that the larger international carriers benefit from

<sup>1</sup> This does not mean that the BER threshold is not met in these cases, i.e. it does not mean that the large alliances are exempt under the BER: the relevant market shares consists of the combined market shares of the participating carriers. As shown in table 3 for example, the members of the large alliances also offer services outside the alliance on the Europe – North America trade. The associated market share is relevant for determining the combined share for the purposes of the BER threshold.

<sup>2</sup> We note that the market share threshold of the BER is based on volume market shares, not capacity market shares as shown in this report. Capacity market shares are used in this report because data was not available at a sufficiently granular level to calculate volume market shares; also, the Alphaliner database provides capacity data in real time whereas volume data is necessarily delayed.

cooperation with carriers providing specialised intra-European feeder services, enabling through e.g. slot agreements the availability of guaranteed follow-on feeder services, whilst allowing the operators of feeder services to benefit from a steady flow of demand from the larger carriers that allows them to benefit from scale efficiencies.

What is clear in any event, is that there is a broad spectrum of cooperation agreements in the shipping industry, also outside the big East-West alliances.

## 4 Competition in the liner shipping sector

### 4.1 Introduction

It is highly relevant in the context of the evaluation of the Consortia BER to determine whether the liner shipping sector is competitive or not. As also indicated in the BER itself, it can be assumed that the benefits of cooperation between carriers, allowed for by the BER, will be passed on to customers if the market is competitive. Cost savings achieved through scale efficiencies allow carriers to decrease prices. If firms compete on price and efficiencies provide scope to decrease prices, firms will have an incentive to decrease prices to their cost advantage to win market share and/or to match competitors' prices and not lose market share. Firms may have a reduced incentive to pass on cost advantages if they have market power (in economic terms: the ability to price above the competitive level).

For these reasons we will in this section assess the nature of competition in the liner shipping sector at a more general level to determine whether the benefits of cooperation in the industry that is facilitated by the Consortia BER have likely been passed on to customers.

### 4.2 Pricing

The graph below shows the development of pricing between Q1 2013 and Q2 2018 based on Drewry's global average quarterly container freight rates, with and without bunker surcharges (BAF). It shows that in the past 6 years, freight rates have dropped by over 30%, both with and without the BAF.

**Figure 2: Global average quarterly container freight rates (USD/TEU)**



Source: Drewry Maritime Research ([www.drewry.co.uk](http://www.drewry.co.uk))

A similar picture emerges when we look at the development of rates on the East-West trades separately, as shown in figure 3 below. Average freight rates on the East-West routes excluding the BAF have decreased by almost 40% whilst rates including the BAF have decreased by over 30% between Q1 2013 and Q2 2018.

**Figure 3: East-West average quarterly container freight rates (USD/TEU)**



Source: Drewry Maritime Research ([www.drewry.co.uk](http://www.drewry.co.uk))

The development of rates, as shown in these graphs, is indicative of rates being responsive to market forces, and do not indicate that either recent consolidation in the industry, or the emergence of the large alliances, have resulted in a lessening of competition. If consolidation and/or the large alliances would have resulted in market power, one would expect such power to translate to capacity rationing in order to try and increase prices above the competitive level.

That is not what the above figures indicate. Global rates have decreased significantly and, in addition, rates on the East-West trades have decreased at a similar pace when compared to global rates. In our view this is a strong indication that (a) the alliances compete heavily with each other but also (b) that the members of the alliances have continued to compete with each other on price.

Obviously, prices will be influenced by a multitude of factors and it is difficult to draw definitive conclusions only from the above graphs. At the same time however, we have not seen any evidence that would contradict a finding of marked price decreases over time resulting from fierce competition in the market. In our view, this also implies that efficiencies generated by cooperation between carriers, whether through alliances or other types of cooperation, have likely been passed on to customers.

### 4.3 Profitability

Another indication of fierce competition in the market is the low profitability of the sector. If consolidation and cooperation would have resulted in efficiencies, these should have resulted in a significant improvement in the profitability of carriers if these would not have been passed on to customers.

Alphaliner tracks the larger carriers' financial performance in its Monthly Monitor. Whilst not all carriers disclose full financial details, and whilst some carriers report financial figures at group level only, and not separately for their container transport activities, the most recent figures show *inter alia* that:

- COSCO, CMA CGM, Hapag Lloyd, Zim, Evergreen, Yang Ming, HMM and PIL all reported net losses over the first 6 months of 2018. Of the larger carriers only Wan Hai reported a net profit over this period. Maersk Line does not report net profits or losses.
- For the full year 2017 most carriers report small profits relative to their turnover, with EBIT levels (Earnings Before Interest and Taxes) for most carriers below 5% of revenues. As container shipping is a capital intensive industry the return on capital invested is highly likely to be low for most, if not all, carriers. For example, Maersk reports that the capital invested in Maersk Line amounts to over \$ 25 billion, whilst revenues are over \$ 24 billion. If capital invested is close to revenues, then a 5% EBIT on revenues translates into a similarly low rate of return on capital employed of below 5% (with return on capital expressed as EBIT divided by capital employed).<sup>3</sup>

The losses in the first half of 2018 and small profits reported over 2017 strongly suggest that the industry is competitive and the absence of market power that would enable carriers to price above the competitive level.

### 4.4 Concentration levels

Market shares and the Herfindahl-Hirschman Index (HHI – calculated as the sum of squared market shares) are often used as proxies for market power. These are relatively simplistic, but nevertheless useful first indicators or screening devices. They are simplistic because high market shares or high HHIs do not necessarily imply the presence of market power – markets with a limited number of players can in practice be very competitive. At the same time these are useful indicators, or screens, as low market shares or HHIs indicate a likely absence of market power.

The European Commission and other competition authorities use market share and HHI levels typically in the latter context, i.e. as thresholds below which competition issues are unlikely. If thresholds are exceeded this does not imply competition issues, but rather indicates that a more detailed assessment may be required. The market share threshold in the BER is based on similar logic: as long as the combined market shares of participants to a consortium is below 30%, competition issues are assumed to be unlikely, whereas consortia that exceed

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<sup>3</sup> The return on capital for Maersk Line may well be different – Maersk does not report EBIT for Maersk Line.

this threshold are outside the scope of the BER, not necessarily problematic, but do require self-assessment.

Although market shares and HHI levels should be calculated with reference to relevant antitrust markets, it is in our view also useful to consider the structure of the industry at a global level, so as to allow for an overall picture.

The table below shows the global capacity shares of the largest 12 carriers as at October 2018. There are only 4 carriers with a share above 10% and there are no carriers with a share of over 20%.

**Table 2: Global capacity shares largest 12 carriers**

APM-Maersk	17.70%
MSC	14.50%
COSCO	12.40%
CMA CGM	11.60%
Hapag-Lloyd	7.10%
ONE	6.70%
Evergreen	5.20%
Yang Ming	2.80%
PIL	1.80%
HMM	1.80%
ZIM	1.50%
Wan Hai	1.10%

Source: Alphaliner

The HHI of the industry at a global level is below 1000: calculated on the basis of global capacity shares, the HHI of the largest 30 carriers is 955. That is not indicative of a concentrated market; a similar result would be obtained if the market would consist of 10 players with each having a 10% market share.

The Horizontal Merger Guidelines of the European Commission confirm this by stating that: “[T]he Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1000. Such markets normally do not require extensive analysis.”<sup>4</sup>

Whilst market shares and HHI levels will vary between trades and may be higher, it is worth noting that the recent consolidation in the industry has not resulted in merger cases in which divestments were required for parties to obtain clearance. Despite the recent consolidation in

<sup>4</sup> EU Horizontal Merger Guidelines, paragraph 19. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN)

the industry, one therefore has to conclude that the liner shipping sector is still not very concentrated when viewed at a firm level.

In its merger decision practice, the Commission has also looked at market shares and HHI levels at the consortium level, i.e. by combining the market shares of consortia partners into joint consortia-level market shares, and by using these shares to calculate HHIs. Although this may provide some insights into the role of consortia on particular trades, and may help to justify merger remedies to prevent cross-membership of multiple consortia on a trade, such presentation of the industry is problematic in our view as it ignores vigorous competition for customers between consortium members.

Whilst the BER does allow consortia to adjust capacity in response to fluctuations in supply and demand (which is an inherent restriction without which it would be impossible to operate an efficient consortium in the first place), the BER does not allow for price fixing, market sharing and the limitation of capacity or sales, i.e. consortia members continue to compete with each other.

Presenting combined shares of consortium members and/or calculating HHIs based on the combined shares of consortium members, hence underestimates competition in the market, and overestimates the true degree of concentration in the market.

In any event, even though market shares and HHIs may be useful first screens for the likelihood of competition issues in markets, we have already shown above that the development of pricing as well as the overall low profitability of the carriers signal fierce competition between carriers.

## **4.5 Conclusions**

- In Section 2 and the Annex to this report we have shown the existence of a large degree of cooperation within the liner shipping industry, in particular also outside of the large East-West alliances.
- Despite recent consolidation resulting from mergers and acquisitions, the level of concentration in the industry at the global level remains relatively low.
- Prices have decreased over time and the profitability of the carriers is low, suggesting fierce competition between the firms active in the industry.
- This strongly suggests in our view that consortia do not result in less effective competition, and may in fact have contributed to competition in the industry.
- Consortia may well have contributed to competition in the industry by lowering entry barriers, thereby allowing firms to compete on routes for which they would otherwise – absent cooperation – suffer a lack of scale or a lack of demand. Absent cooperation, firms may not have been able to continue to operate on certain trades, or would have been forced to offer an inferior, much less frequent service.

- Fierce competition in the industry strongly suggest that benefits of the cooperation agreements between carriers have been passed on to customers through lower pricing and the availability of services that would not exist in the same form in the absence of cooperation between carriers.

In the next Section we will respond to some of the critique on the BER and the cooperation the BER seeks to facilitate. In particular, we will respond to some of the points made in the report of the International Transport Forum, as this report appears to be the main 'vehicle' for those parties that do not support the extension of the BER beyond 2020.

## 5 Response to the ITF report

### 5.1 Introduction

A recent report of the International Transport Forum (ITF) titled “*The Impact of Alliances in Container Shipping*”<sup>5</sup> touches upon many of the issues relevant for the purposes of the evaluation of the BER. The report also covers issues which are not, at least not in our view, directly relevant for the evaluation of the BER, such as policies with respect to ports. We will discuss some of the relevant issues touched upon in the report below.

Generally speaking, the report, in our view, (1) confirms our findings with respect to the competitive nature of the industry, whilst (2) at the same time making some unsubstantiated claims on alleged anticompetitive behaviour, and (3) makes an unconvincing case for not extending the BER. We will address these points in turn below.

### 5.2 ITF report confirms competitive nature of the shipping industry

The ITF report confirms that containerised freight rates have decreased over time in the past two decades, and have also decreased recently. In particular, the ITF report notes that since 1998 the China Containerised Freight Index (CCFI) has decreased by more than 20%, and that “*inflation adjusted freight rates have shown that the cost of shipping a container have halved over this period, taking into account that bunker prices have increased more than five-fold since 1998.*”<sup>6</sup>

The ITF report also refers to assessments made by the US Federal Maritime Commission, showing that “*over 2014-2018, average revenue per TEU steadily declined for these [monitored] trades*”, and that *this assessment is based on the collection and analyses of “revenue data, inclusive of freight rates, surcharges and inland haulage”*.

The ITF report links these price decreases to greater efficiencies brought about by the utilisation of larger, more efficient vessels. A confirmation of this is found in one of the sources cited in the ITF report, stating that: “*Most savings from operational and organisational efficiencies in the past two decades have mostly been passed on to shippers in the form of lower freight rates, both in nominal and in real terms.*”<sup>7</sup>

In addition, the ITF report establishes a link between alliances and the deployment of larger vessels, including the possibility for smaller players to “*get access to big ships that they would otherwise not have had*”.<sup>8</sup>

Furthermore, the ITF report confirms the low profitability of the industry.<sup>9</sup>

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<sup>5</sup> International Transport Forum, *The Impact of Alliances in Container Shipping*, 2018, <https://www.itf-oecd.org/impact-alliances-container-shipping>.

<sup>6</sup> ITF report, page 31.

<sup>7</sup> Lloyd's Loading List, *Sea freight rates fall 50% in 20 years*; <https://www.lloydsloadinglist.com/freight-directory/news/Sea-freight-rates-fall-50-in-20-years/72079.htm>.

<sup>8</sup> ITF report, page 20.

<sup>9</sup> ITF report, pages 21-23.

Based on the above, the ITF report therefore in our view confirms that (a) alliances have contributed to achieving efficiencies by being able to deploy larger vessels and decreasing entry barriers for smaller operators, (b) that rates have decreased allowing customers to benefit from these efficiencies, also confirmed by (c) the low profitability of the industry. The ITF report hence appears to confirm our findings earlier in this report.

### 5.3 Unsubstantiated and contradictory allegations in the ITF report

In an apparent attempt to put the industry in a negative light, the ITF report suggests that the carriers may have artificially increased prices through applying surcharges, and may have colluded on setting capacities. The ITF report does not provide any evidence supporting these allegations. In fact, the assessment of the ITF itself directly contradicts these claims.

#### 5.3.1 Freight rates and surcharges

As regards rates and surcharges, the ITF report states that information on rates cannot be relied upon as *“freight rates only tell part of the story”*<sup>10</sup> and that *“(…) carriers have been involved in revenue generation in applying higher surcharges…”*<sup>11</sup>

However, as we have shown earlier in this report rates have dropped significantly, also when taking the most important surcharge, the BAF, into account. As stated by Alphaliner: *“Real container freight rates, after accounting for changes in the price of bunker, have fallen by more than 50% in the last 20 years.”*<sup>12</sup>

In addition, in Section 5.2 above we have already referred to the FMC assessments, mentioned by the ITF itself, which indicate that revenues per TEU, including surcharges, have steadily declined.

There is hence not a shred of evidence confirming ITF’s allegation that carriers would somehow have maintained artificially high overall freight rates through surcharges.

Furthermore, the ITF report tries to imply that it is unusual or inappropriate for surcharges in general to represent a *“higher proportion of total costs compared to base rates”* and cites a study that looked at rate levels in 2009.<sup>13</sup> Yet, during the same year, freight rates dropped over 20% from 2008 - an unprecedented decline - due to the weak global market and overcapacity resulting from the delivery of ships that were ordered before the recession.<sup>14</sup>

With rates dropping so fast in one year, it is not surprising that surcharges will represent a higher percentage of total costs in comparison to previous years. Additionally, the study is almost a decade old and looks at data from one of the worst years facing the industry in recent history.

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<sup>10</sup> ITF report, page 32.

<sup>11</sup> Ibid.

<sup>12</sup> Alphaliner, *Weekly Newsletter 23, 2018*.

<sup>13</sup> ITF report, page 32.

<sup>14</sup> Thomson Reuters, *Maersk Line sees shipping overcapacity for five years*; <https://www.reuters.com/article/us-nordic-summit-maersk/maersk-line-sees-shipping-overcapacity-for-five-years-idUSBRE9910LB20131002>.

### 5.3.2 Capacity

The ITF report suggests that alliances may coordinate their behaviour with respect to the ordering of large vessels.<sup>15</sup> This claim is not substantiated. In fact, ITF contradicts its own allegation on the very same page of the report that includes it. The ITF namely states that competition within alliances may also have contributed to the ordering of large vessels. More generally, any suggestion of coordination is refuted by ITF's conclusions that "*Mega-ships have driven overcapacity in the sector*" and that "*global alliances have exacerbated the problem of excess investment and overcapacity*".

The message that the ITF report seeks to convey is not very clear, but the complaint of ITF appears to be that overcapacity and the resulting low profitability is a problem.

Whilst overcapacity and low profitability may indeed be an issue for the sector, these characteristics do signal, from an economic perspective, that (a) there is no coordination on capacity, (b) that the growth in capacity in the market has followed and even outstripped the growth in demand and (c) that this has contributed to pressure on pricing and low profitability.

If anything, this goes to show that alliances have not contributed to less effective competition in the sector. On the contrary, taken at face value, these statements from the ITF report strongly suggest that alliances have contributed to fierce competition in the industry, and that efficiencies have been passed on to customers in full.

### 5.3.3 Conclusion

Although ITF appears eager to suggest collusion between the carriers, the report does not present any convincing evidence for such collusion. To the contrary, ITF's own conclusions as regards the functioning of the market directly contradict any suggestion of collusion. It is also not very clear what the ITF is getting at: our reading of the report suggests that the ITF would in fact be in favour of more coordination, including on the ordering of new ships, rather than less coordination. The ITF report states for example: "*Various studies indicate that benefits could be attained if partner carriers are willing to work out **full collaboration***"<sup>16</sup> (emphasis added). In this regard, the ITF report is rather confusing.

## 5.4 Service quality

The main problem that the authors of the ITF report appear to have with the shipping industry at large is a perceived lack of service quality. The rationalisation of services, brought about in particular by the deployment of large vessels, would have resulted in lower quality services, less differentiation, and hence less choice for customers. These complaints in relation to service quality also appear to be the main driver for the ITF report to advise against an extension of the BER.

On this topic, we consider the ITF's logic to be seriously flawed for several reasons.

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<sup>15</sup> ITF report, page 21.

<sup>16</sup> ITF report, page 13.

- First, the ITF report appears to mainly take aim against the large East-West alliances, whilst, as we have shown in this report, there are a larger number of cooperation agreements outside of the large alliances. It is not clear from the ITF report why they chose to ignore the extensive cooperation in the industry outside of the large alliances.
- Second, the ITF report itself notes that the price sensitivity of shippers is high and that it is questionable whether there would be demand for higher quality, higher priced services. The report states for example that “(...) *there is some doubt as to the level of effective demand for higher price/higher quality service combinations. It has been observed that shippers can express demands that they are actually not willing to pay for.*”<sup>17</sup> If shippers are not prepared to pay a higher price for a higher quality service, that service will not be on offer. The ITF may conclude that current market outcomes are not ideal, but it is highly questionable whether not extending the BER would be a solution to this.
- Third, and most importantly, any forward-looking assessment is completely absent from the ITF report. For the purposes of extending the BER or not, the relevant question is whether the BER will continue to contribute to establishing and/or maintaining pro-competitive cooperation between shipping lines to the benefit of customers in the next couple of years.
- In this context it is also highly relevant to know what the counterfactual is, i.e. how the market would look like in the absence of the BER and the cooperation it contributes to. Our view is that if the BER is important in establishing cooperation agreements in the industry – then, logically, not extending the BER will result in some cooperation agreements dissolving which will likely result in a strong push for the market to consolidate and a deterioration in service quality levels; i.e. the opposite of what the ITF report seeks to achieve.

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<sup>17</sup> ITF report, page 27.

## Annex

### A Overview of consortia

The tables below provide overviews of the cooperation agreements in place on the major trade lanes as at early November 2018, based on the information available from Alphaliner.

These tables should be interpreted with some caution for the following reasons:

- The Alphaliner database provides detailed information at the level of individual services provided by carriers. The database indicates which services are operated jointly, i.e. through vessel sharing agreements (VSAs) and in which services slot agreements are in place. However, a VSA or slot agreement may cover multiple services on a particular trade. The Alphaliner database does not however show which services are covered by which cooperation agreement. Since we are interested, for the purposes of this report, in the number of unique cooperation agreements, we have therefore had to aggregate services to avoid double counting of the likely number of cooperation agreements in place.
- Alphaliner updates the service offering of carriers on a continuous basis to account *inter alia* for seasonality in demand and the resulting adjustments in the service offering of the carriers. In addition, lighter less-structural, forms of cooperation, such as slot charter agreements (also covered by the BER), can be introduced or terminated at short term. The overviews presented are hence a snap-shot picture that evolves over time.
- We have grouped cooperation agreements by geographic scope, whilst at the same time trying to prevent double counting. 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. For example, we have grouped all services between Europe and Africa in one table.
- Likewise, the shares presented in the tables should not be considered shares on relevant markets; these are simply the capacity shares at service level calculated with reference to the total capacity represented in the table.
- Weekly capacity data is not available for all services and hence not for all cooperation agreements.
- For completeness, the tables include a row indicating “single carrier services”, this combines the services and associated weekly capacity for those services offered by a single carrier. A single carrier is defined at group level, i.e. if sister companies that are owned by the same parent operate a combined service, this is considered as a single carrier service.
- Finally, some firms which have merged are still operating in their own name and not all impact from mergers and acquisitions is (yet) visible in the tables. For example, whilst OOCL has merged with COSCO, OOCL still operates as a separate brand in the market.

Similarly, Hamburg Süd is mentioned as an independent line in the overview tables whilst (a) it has been acquired by Maersk Line and (b) it is our understanding that Maersk Line has undertaken to make changes to some of the cooperation agreements on the Europe – South America trade in the context of this acquisition of Hamburg Süd. It is our understanding that some of these changes may still need to take effect.

However, also with these caveats, we consider that the summary overview below presents an appropriate picture of the breath of cooperation within the industry that the BER seeks to cover and facilitate.

**Table 3: Europe – North America**

<b>Consortia</b>	<b>Avg. TEU per week</b>	<b>TEU Share</b>
2M	36,055	21.02%
THE Alliance *	27,917	16.27%
OCEAN Alliance	17,595	10.26%
Hapag-Lloyd; Slots: CMA CGM, Zim	8,702	5.07%
CMA CGM / Hapag-Lloyd / ONE / OOCL	8,090	4.72%
Hamburg Süd / Hapag-Lloyd *	4,777	2.78%
Hapag-Lloyd / OOCL	4,312	2.51%
Zim; Slots: Hapag-Lloyd, ONE, Yang Ming	4,250	2.48%
Hapag-Lloyd / MSC / OOCL	4,055	2.36%
CMA CGM / Maersk Line	2,919	1.70%
CMA CGM / Marfret	1,890	1.10%
Turkon Line; Slots: NileDutch, X-Press Feeders	1,744	1.02%
Single carrier services	49,232	28.70%
<b>Grand Total</b>	<b>171,538</b>	<b>100.00%</b>

Source: Alphaliner database;

NB: Table includes capacity data only for cooperation agreements that are listed as full container (FC) services in the Alphaliner database and if such information is available for them. The region of Europe is specified as to include both the "North Europe" and "Mediterranean" definitions of the European Commission (EC); The region of North America is defined as the combination of the "US East Coast / US Gulf / US West Coast" and "USNH / Canada" region classifications of Alphaliner; Carriers' names are depicted as seen in the Alphaliner database. In some instances, services are listed as being operated by carriers that have been acquired by other carriers (eg. OOCL has been acquired by COSCO, but still appears in the data); Asterisk denotes cases where one or more of the aggregated services include slot agreements with parties that are not connected in any way to the carrier(s) operating the vessel (eg. not a consortium member, subsidiary/parent company or a subsidiary/parent company of a consortium member).

**Table 4: Europe – Middle East – Indian Subcontinent – Far East – Australia & New Zealand**

<b>Consortia</b>	<b>Avg. TEU per week</b>	<b>TEU Share</b>
2M *	151,492	28.63%
OCEAN Alliance *	143,470	27.12%
THE Alliance	98,689	18.65%
MSC; Slots: SCI, Zim	19,288	3.65%
CMA CGM / COSCO / Hapag-Lloyd *	16,565	3.13%
CMA CGM / Hapag-Lloyd / MSC *	9,068	1.71%
CMA CGM / Hapag-Lloyd / ONE / OOCL	8,090	1.53%
CMA CGM / Hapag-Lloyd	8,064	1.52%
ANL / CMA CGM / Hapag-Lloyd	6,731	1.27%
APL / CMA CGM / COSCO	3,957	0.75%
CMA CGM / Marfret	1,890	0.36%
Single carrier services	61,789	11.68%
AAL / Peter Döhle	N/A	-
CMA CGM / COSCO / Hapag-Lloyd *	N/A	-
APL / CMA CGM / COSCO / MSC *	N/A	-
NSCSA; slots: Rickmers	N/A	-
Zeaborn; slots: Bahri	N/A	-
<b>Grand Total</b>	<b>529,093</b>	<b>100.00%</b>

Source: Alphaliner database;

NB: Table includes capacity data only for cooperation agreements that are listed as full container (FC) services in the Alphaliner database and if such information is available for them. VSAs and slot agreements that lack capacity data and take place between carriers not connected via ownership structures (eg. subsidiaries) are listed at the end. These also cover services other than full container, such as break-bulk and ro-ro services;  
The region of Europe is specified as to include both the "North Europe" and "Mediterranean" definitions of the European Commission (EC); Middle East and Far East are defined as in the Alphaliner database and they are assumed to be in line with the definition applied by the European Commission; The region "Indian Subcontinent" covers all ports that fall into this geographic region. These are manually retrieved from the Alphaliner database; The region "Australia & New Zealand" is defined as in the Alphaliner database and is assumed to be in line with the definition applied by the European Commission; The undertaken aggregation of these four regions is deemed appropriate due to the significant overlap of services to/from each individual region specification;  
Carriers' names are depicted as seen in the Alphaliner database. In some instances, services are listed as being operated by carriers that have been acquired by other carriers (eg. OOCL has been acquired by COSCO, but still appears in the data);  
Asterisk denotes cases where one or more of the aggregated services include slot agreements with parties that are not connected in any way to the carrier(s) operating the vessel (eg. not a consortium member, subsidiary/parent company or a subsidiary/parent company of a consortium member).

**Table 5: Europe – Africa**

<b>Consortia</b>	<b>Avg. TEU per week</b>	<b>TEU Share</b>
MSC; Slots: Hapag-Lloyd, Stinnes, WEC	10,772	11.01%
DAL / Maersk Line / ONE / Safmarine	7,694	7.86%
CMA CGM; Slots: Arkas, NileDutch	6,641	6.79%
Arkas / CMA CGM / Hapag-Lloyd	4,264	4.36%
CMA CGM / NileDutch	4,156	4.25%
CMA CGM / Marguisa *	3,419	3.49%
Boluda Lines; Slots: Arkas, MacAndrews	3,324	3.40%
Arkas / Hapag-Lloyd *	2,756	2.82%
WEC Lines; Slots: Grupo JSV, MSC	2,345	2.40%
Arkas / EMES / Sealand *	2,270	2.32%
COSCO / Messina / MSC	2,259	2.31%
D'Amico Dry Maroc; Slots: Maersk	2,061	2.11%
Arkas / Nisa Maritima	946	0.97%
MacAndrews; Slots: DAL	925	0.95%
X-Press Feeders; Slots: Maersk, Marguisa	865	0.88%
Single carrier services	43,172	44.11%
Arkas / Hapag - Lloyd	N/A	-
ACSA 92 / Conti Lines	N/A	-
PCI; slots: Maersk, MSC, Safmarine	N/A	-
X-Press Feeders; slots: Arkas, MacAndrews, Maersk, Marguisa, Sealand, UFS, Zim	N/A	-
<b>Grand Total</b>	<b>97,869</b>	<b>100.00%</b>

Source: Alphaliner database;

NB: Table includes capacity data only for cooperation agreements that are listed as full container (FC) services in the Alphaliner database and if such information is available for them. VSAs and slot agreements that lack capacity data and take place between carriers not connected via ownership structures (eg. subsidiaries) are listed at the end. These also cover services other than full container, such as break-bulk and ro-ro services;

The region of Europe is specified as to include both the "North Europe" and "Mediterranean" definitions of the European Commission (EC); Africa is defined as the combination of the ports included in the "West Africa", "Canary Islands & Morocco" and "South & East Africa" region classifications of Alphaliner;

Carriers' names are depicted as seen in the Alphaliner database. In some instances, services are listed as being operated by carriers that have been acquired by other carriers (eg. OOCL has been acquired by COSCO, but still appears in the data);

Asterisk denotes cases where one or more of the aggregated services include slot agreements with parties that are not connected in any way to the carrier(s) operating the vessel (eg. not a consortium member, subsidiary/parent company or a subsidiary/parent company of a consortium member).

**Table 6: Europe – South America**

Consortia	Avg. TEU per week	TEU Share
CMA CGM / Hamburg Süd / Maersk Line *	19,261	17.92%
Hapag-Lloyd / MSC *	17,967	16.72%
MSC; Slots: Hapag-Lloyd	10,802	10.05%
CMA CGM / COSCO / Hapag-Lloyd *	10,114	9.41%
CMA CGM / Marfret *	7,535	7.01%
Hamburg Süd / Hapag-Lloyd	4,777	4.44%
CMA CGM / Hamburg Süd / Hapag-Lloyd	3,805	3.54%
CMA CGM / Hapag-Lloyd *	2,560	2.38%
Single carrier services	30,657	28.53%
ACSA 92 / Conti Lines	N/A	-
Geest; slots: Seatrade	N/A	-
MSC; slots: Hapag-Lloyd	N/A	-
<b>Grand Total</b>	<b>107,478</b>	<b>100.00%</b>

Source: Alphaliner database;

NB: Table includes capacity data only for cooperation agreements that are listed as full container (FC) services in the Alphaliner database and if such information is available for them. VSAs and slot agreements that lack capacity data and take place between carriers not connected via ownership structures (eg. subsidiaries) are listed at the end. These also cover services other than full container, such as break-bulk and ro-ro services;  
The region of Europe is specified as to include both the "North Europe" and "Mediterranean" definitions of the European Commission (EC); The region of South America is defined by the ports included in the "Europe / Caribbeans & North Coast of South America (incl. Guyanas)", "Europe / West Coast of South America" and "Europe / East Coast of South America" region classifications of Alphaliner;  
Carriers' names are depicted as seen in the Alphaliner database. In some instances, services are listed as being operated by carriers that have been acquired by other carriers (eg. OOCL has been acquired by COSCO, but still appears in the data);  
Asterisk denotes cases where one or more of the aggregated services include slot agreements with parties that are not connected in any way to the carrier(s) operating the vessel (eg. not a consortium member, subsidiary/parent company or a subsidiary/parent company of a consortium member).

**Table 7: Intra-Europe**

<b>Consortia</b>	<b>Avg. TEU per week</b>	<b>TEU Share</b>
MSC; Slots: WEC, Zim	14,661	6.73%
CMA CGM / Hamburg Süd / Sealand *	12,676	5.82%
X-Press Feeders; Slots: ACL, APL, Arkas, BG Freight, CMA CGM, COSCO, Eucon, Evergreen, Hapag-Lloyd, MacAndrews, Maersk, Mann Lines, Marguisa, Melfi, MCL Feeders, Nisa, OOCL, Sealand, Team Lines, UFS	9,514	4.37%
Hapag-Lloyd; Slots: CMA CGM, Evergreen, Turkon, UFS, Zim	7,310	3.36%
MSC / Zim *	6,026	2.77%
WEC Lines; Slots: MSC	5,506	2.53%
Arkas / EMES / Maersk / Sealand *	5,111	2.35%
Sealand; Slots: Borchard, Hapag-Lloyd, Zim	4,504	2.07%
COSCO / Hapag-Lloyd / OOCL *	4,334	1.99%
CMA CGM; Slots: FESCO ESF, UFS, Unifeeder, X-Press feeders, Yang Ming	4,210	1.93%
COSCO / Evergreen / Yang Ming	3,688	1.69%
Evergreen (Italia Marittima); Slots: Arkas, EMES, Tarros, X-Press feeders	3,668	1.68%
COSCO; Slots: Eucon, X-Press Feeders, Yang Ming	3,222	1.48%
Unifeeder; Slots: CMA CGM	3,059	1.41%
Unifeeder / X-Press Feeders *	3,027	1.39%
Arkas / EMES / Tarros *	2,792	1.28%
CMA CGM / FESCO ESF *	2,171	1.00%
Unimed (UFS) (Unifeeder); Slots: APL, CMA CGM, Maersk, MCL Feeders, Melfi, Messina, Sealand, X-Press Feeders, Zim	2,025	0.93%
DFDS / MacAndrews *	1,996	0.92%
Yang Ming; Slots: Arkas, EMES, Turkon, UFS	1,803	0.83%
MCL Feeders; Slots: UFS	1,732	0.80%
Arkas/ EMES / Hapag-Lloyd *	1,658	0.76%
Arkas / EMES / Zim *	1,340	0.62%
CMA CGM / COSCO	1,296	0.60%
Yang Ming; Slots: COSCO	1,223	0.56%
Maersk Line; Slots: X-Press Feeders	1,092	0.50%

<b>Consortia</b>	<b>Avg. TEU per week</b>	<b>TEU Share</b>
CMA CGM / Feeder Associate System (FAS)	1,034	0.47%
COSCO / Zim	998	0.46%
BG Freight; Slots: CMA CGM, Maersk, Sealand	974	0.45%
MacAndrews; Slots: X-Press Feeders	801	0.37%
Arkas / EMES / Tarros	528	0.24%
Single carrier services	103,741	47.65%
A2B-online; slots: Viasea	N/A	-
BG Freight; slots: CMA CGM, Evergreen, Eucon, Maersk, MSC, Sealand, Yang Ming	N/A	-
Blue Ice Lines; slots: EMES, Maersk, Zim	N/A	-
Cie Tunisienne de Navigation; slots: Marfret	N/A	-
CMA CGM / FAS	N/A	-
Containerships; slots: Viasea, Samskip, Unifeeder, UFS	N/A	-
COSCO; slots: CMA CGM, Unifeeder, Yang Ming	N/A	-
ICG; slots: BG Freight, DFDS, Samskip	N/A	-
Grimaldi; slots: Van Uden	N/A	-
Hapag-Lloyd; slots: ONE	N/A	-
K Line; slots: BG Freight	N/A	-
MacAndrews; slots: EuroAfrica, Samskip	N/A	-
Mann Lines; slots: CMA CGM	N/A	-
Marfret; slots: CMA CGM	N/A	-
Messina; slots: Arkas	N/A	-
MTL Feeders; slots: Arkas, Medex	N/A	-
Norlines / Samskip	N/A	-
Salamis; slots: Zim	N/A	-
Samskip; slots: BG Freight	N/A	-
SCA Transforest; slots: Samskip	N/A	-
SCS Multiport; slot: Samskip	N/A	-
Sea Connect; slots: Stream Lines, Swan CL	N/A	-
Shortsea Express Lines; slots: ARRC	N/A	-

<b>Consortia</b>	<b>Avg. TEU per week</b>	<b>TEU Share</b>
CMA CGM / FESCO *	N/A	-
CMA CGM / Marfret	N/A	-
CMA CGM / DFDS / Marfret	N/A	-
MSC / WEC	N/A	-
ProCargo Line / Tarros	N/A	-
Swedish Orient Line; slots: Ahlmark, Finnlines	N/A	-
Arkas (EMES); slots: Brintmerd, Messina, Tarros	N/A	-
Messina / Tarros *	N/A	-
Delphis / Team Lines *	N/A	-
CMA CGM / Unifeeder *	N/A	-
OOCL / Unifeeder *	N/A	-
<b>Grand Total</b>	<b>217,720</b>	<b>100.00%</b>

Source: Alphaliner database;

NB: Table includes capacity data only for cooperation agreements that are listed as full container (FC) services in the Alphaliner database and if such information is available for them. VSAs and slot agreements that lack capacity data and take place between carriers not connected via ownership structures (eg. subsidiaries) are listed at the end. These also cover services other than full container, such as break-bulk and ro-ro services;  
This table presents market shares based on the aggregation of the "North Europe only", "Intra Mediterranean" and "North Europe / Mediterranean" region classifications of Alphaliner;  
Carriers' names are depicted as seen in the Alphaliner database. In some instances, services are listed as being operated by carriers that have been acquired by other carriers (eg. OOCL has been acquired by COSCO, but still appears in the data);  
Asterisk denotes cases where one or more of the aggregated services include slot agreements with parties that are not connected in any way to the carrier(s) operating the vessel (eg. not a consortium member, subsidiary/parent company or a subsidiary/parent company of a consortium member).



## **Annex 2**

### **Comments on International Transport Forum (ITF) Report Entitled “*The Impact of Alliances in Container Shipping*”**

We make the affirmative case above for renewal of the consortia block exemption regulation for an additional 5-year period. There are, however, other voices that have proposed a different outcome. The primary statement of that contrary view is expressed through a report titled “*The Impact of Alliances in Container Shipping*,” issued under the name of the International Transport Forum, with the primary author being ITF staffer Olaf Merk. Because the ITF report is lengthy and has been widely circulated, we address it in some detail. As we demonstrate below, the ITF report is internally inconsistent, contradicted by the facts, and unpersuasive in its policy recommendation regarding renewal of the BER.

At the outset, there is a logical flaw in the ITF report that renders its other shortcomings almost academic. The ITF report bases its recommendation for a presumption against renewal of the BER solely on its analysis of the three largest carrier alliances. However, as the report concedes, at least two of the three global alliances are not covered by the BER because of their market shares, and they must therefore already self-assess. The ITF report expressly acknowledges this, stating at page 77:

*“The EU Block Exemption applies to alliances that remain below the relevant market share of 30%; alliances need to conduct self-assessments in case they exceed this ceiling. Both 2M and Ocean Alliance exceed that threshold for certain relevant markets, so could already be expected to conduct self-assessments.”*

The vast majority of consortia operating in the EU do fall within the scope of the BER and would be directly and negatively affected by its non-renewal: the RBB Report provides an overview of the consortia operating on certain European trades, from which it is apparent that there are 61 vessel sharing arrangements outside the big 3 alliances and at least an additional 57 services with slot agreements with third parties in place operating on the European trades covered by RBB’s analysis. All of those arrangements for which capacity data is available are below the 30% market share threshold in the Consortia BER.

The ITF report plainly urges non-renewal of the BER in its entirety, yet the report does not even acknowledge, much less analyze, the impact of non-renewal on the vast majority of the agreements covered by the BER. Put differently, the ITF report’s recommendation regarding the BER is based solely on an analysis of alliances that are to a significant extent not covered by that regulation, but

the primary effects of adopting the report’s recommendations would be felt by carrier cooperations that the report does not even attempt to analyze. The logical disconnect is obvious, and it disqualifies the report as a credible contribution to the policy discussion.

Although the logical flaw described above renders the ITF report largely irrelevant to the discussion of renewal of the BER, the report makes a number of assertions that the Commission might consider as relevant background for its deliberations. Because many of these assertions are either factually inaccurate, internally inconsistent, or analytically flawed, they warrant some discussion to ensure that the Commission proceeds on the basis of the best available information and analysis. We address below five aspects of the ITF report that are problematic. In addition, several of these points are discussed in Section 5 of the RBB Report that is submitted simultaneously with these comments.

#### 1. Market Concentration

The ITF report claims that the global container shipping market is “*concentrated*” (p.7) and “*an oligopoly*” (p.37), and cites a 1999 study as authority for the proposition that a market is “*highly concentrated if the HHI [Herfindahl-Hirschman Index]-ratio is higher than 1800*” (Shepperd, 1999) (p.39). At page 78 the report claims that “*the industry has . . . recently reached a position of high concentration when assessed on key measures*”. But Figure 9 (p.38) shows an HHI score<sup>1</sup> of less than 1400 for the global shipping industry. According to RBB, that number on a global basis is just below 1000.

Moreover, the Report fails to cite two more authoritative and relevant sources for the assessment of HHI concentration ratios – which support the fact that the industry is not concentrated:

- The US DOJ and FTC Horizontal Merger Guidelines show that a market is unconcentrated where it has an HHI score below 1500.

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<sup>1</sup> The Herfindahl-Hirschman Index (HHI) is calculated by squaring the market share (in this analysis the effective headhaul capacity is used as a proxy) of each company competing in the market, and then summing the resulting numbers, ranging from close to zero to 10,000, the latter being indicative of a monopoly. The higher the number the more concentrated a market is considered to be.

- The European Commission Guidelines on the assessment of horizontal mergers state that *“The Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250”*.

It is true that the container shipping industry is more concentrated than it once was. What is important to keep in mind is that, despite that recent increase in concentration, the industry remains relatively unconcentrated by any objective measure. Relative change regarding global concentration must be viewed in terms of where the industry began (highly fragmented) and where it finds itself today: a combination of “competitive” (low concentration) and “moderately concentrated,” depending on trade lane.

With respect to individual trade lanes, the ITF report demonstrates that the highest market share concentrations actually occur where global alliances do not operate. For example, Figure 10 at page 39 shows relatively high four-firm concentration ratios for seven trades, all of which are outside of the primary east-west trades served by the three large alliances. Thus, to the extent that the report says anything about the relationship between the existence of alliances and market concentration, the relationship shown is inverse.

The ITF report does not offer granular market concentration figures or analysis with respect to the major east-west trades in which the three largest alliances operate. The only numbers that the report offers with respect to those trades are for aggregated alliance market shares. Such numbers are useful for determining whether an alliance falls within the BER’s market share “safe harbor,” but they mean very little from a market power standpoint, because alliances, like other vessel sharing agreements, are operational cooperations, not commercial cooperations.

The report elsewhere acknowledges that there is substantial competition among individual carriers both within and across alliances, but nowhere admits that this fact means that aggregated alliance market shares say virtually nothing about the existence or absence of market power. For example, on page 21 the ITF report suggests that the current generation of alliances is more likely than prior generations to have robust intra-alliance competition, stating: *“As the latest generation of alliances all consist of at least two carriers of similar size, this constellation is more prone to intra-alliance competition than earlier generations of alliances, in which there was mostly one dominant carrier*

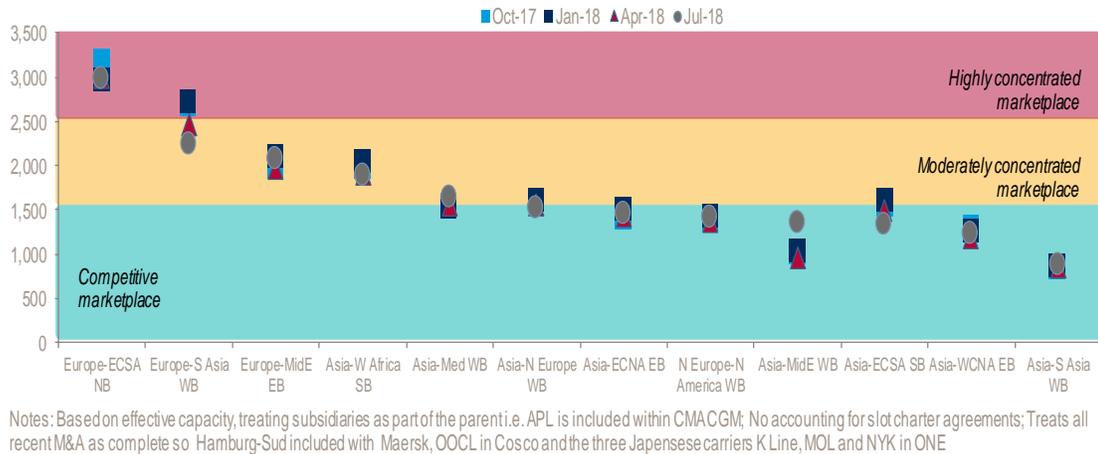
partnering with several smaller carriers.” The ITF report further acknowledges intra-alliance competition at page 31, where it states that “cost and revenue information are usually corporate secrets that alliance partners are not likely to see [ . . .].” As we will discuss in the next section on market power, there is every indication that there is intense competition among all carriers, within and across alliances, and we are aware of no evidence that would support a grouping of vessel sharing arrangement members as a single economic enterprise for the purpose of competition analysis.

The fact that the ITF report fails to present a proper concentration analysis does not mean that one does not exist. Drewry Shipping Consultants recently updated its analysis of concentration in the container shipping industry. The tool used for Drewry’s review was the Herfindahl-Hirschman Index (HHI) methodology, applied to assess the competitive environment in 12 main trade routes globally. The results are reproduced below with permission from Drewry.

**Table 4.18 HERFINDAHL-HIRSCHMAN INDEX (HHI) - MARKET CONCENTRATION IN SELECTED CONTAINER TRADES**

Trade	No. Ship Operators			Herfindahl-Hirschman Index			Concentration level	
	Apr-18	Jul-18	Direction	Apr-18	Jul-18	Direction	Apr-18	Jul-18
Europe-ECSA NB	6	6	→	2,998	2,969	→	High	High
Europe-South Asia V	14	12	↓	2,447	2,225	↓	Moderate	Moderate
Europe-MidE EB	11	11	→	1,965	2,071	↑	Moderate	Moderate
Asia-West Africa SB	8	9	↑	1,890	1,886	→	Moderate	Moderate
Asia-Med WB	10	9	↓	1,551	1,631	↑	Moderate	Moderate
Asia-North Europe V	9	9	→	1,555	1,513	→	Moderate	Moderate
Asia-ECNA EB	9	9	→	1,427	1,453	→	Competitive	Competitive
North Europe-North America WB	15	15	→	1,361	1,409	→	Competitive	Competitive
Asia-MidE WB	19	18	↓	947	1,340	↑	Competitive	Competitive
Asia-ECSA SB	11	11	→	1,493	1,311	↓	Competitive	Competitive
Asia-WCNA EB	15	15	→	1,170	1,215	→	Competitive	Competitive
Asia-South Asia WB	27	26	↓	844	872	→	Competitive	Competitive

Notes: Based on effective capacity, treating subsidiaries as part of the parent i.e. APL is included within CMA CGM; No accounting for slot charter agreements; effective headhaul capacity as a proxy) of each company competing in a market, and then summing the resulting numbers, ranging from close to zero to 10,000. The higher the number the lower the competition, or more concentrated a market is considered to be. Direction arrows only alter when comparison change is 50 points.  
Key: <1,500 = competitive marketplace 1,500-2,500 = moderately concentrated marketplace >2,500 = highly concentrated marketplace  
Source: Drewry Maritime Research



In the context of the ITF report’s focus on the main east-west trades in which the big three alliances operate, it is instructive that those trades all fall into either in the “competitive” or just inside the “moderately concentrated” ranges. This objective analysis directly refutes the ITF report’s overheated “high concentration” and “oligopoly” rhetoric with respect to these trades. The other trade lanes that Drewry analyzes similarly do not show high levels of concentration.

## 2. Market Power

The ITF report uses its erroneous market share analysis to build an equally erroneous market power argument. That the report incorrectly views cumulative alliance market shares as the proper basis for market concentration analysis, and further that the report improperly treats those inflated concentration figures as a valid proxy for market power is perhaps summarized best by this statement at page 33 of the report:

*“Alliances have contributed to an increase in market power. Around 95% of the East-West trade lanes are covered by carriers in alliances, which presents them with considerable market power.”*

The statement fundamentally misunderstands how market shares are calculated and how those market shares relate to market power. Clearly the ITF authors believe that it is proper to combine not just the market shares of carriers in a single alliance, but also that it is proper to combine the market shares of all carriers in all alliances, simply because those carriers are in alliances. The first incorrect assumption is discussed in detail immediately above. The second has no factual or

theoretical support and must be dismissed as pure conjecture. For the sake of completeness, however, because this erroneous set of ITF assumptions is at the very heart of the report's failed thesis, it is important to put the market power assertion to rest.

The RBB Report submitted along with these comments (Annex 1) discusses in detail the cost history of liner shipping for the past five years (see RBB Report at 9-11). That analysis makes clear that the cost of ocean shipping has been declining for years and that those cost savings have been consistently shared with shippers – the most direct evidence available of a highly competitive market. But it is not necessary to consult the RBB Report in order to demonstrate the extent to which vessel sharing has increased efficiency and the extent to which those efficiencies have been passed on to shippers. The ITF report itself contains the proof of those facts.

On page 31, the ITF report discusses the dramatic reduction in the cost of liner shipping over time:

*“Containerized freight rates have halved over the last two decades. Average container freight rates are often used as an indicator for the costs of containerized transport and can be compared over time. There are differences in these freight rates, for example the average nominal freight rate as measured by the China Containerized Freight Index (CCFI). The CCFI reflects the average freight level in China’s export container transport, including spot and contractual rates. Since 1998, the CCFI has declined by more than 20% and inflation-adjusted freight rates have shown that the costs of shipping a container have halved over this period, taking into account that bunker prices have increased more than five-fold since 1998”.* (emphasis added; citation omitted)

The report seeks on the following page to blunt some of the force of these massive price reductions over time by noting that surcharges can comprise a material percentage of the overall cost. That attempt is thwarted, however, by what the report concedes at the bottom of page 32; namely, that where all-in rates (including surcharges) have been tracked, the reductions still hold: *“In its monitoring of agreements, the United States Federal Maritime Commission (FMC) collects and analyses average revenue data, inclusive of freight rates, surcharges and charges for inland haulage. Over 2014-2018, average revenue per TEU steadily declined for these trades.”* We note

that the time period quoted corresponds perfectly with the period since the Commission's last BER review.

### 3. Service Levels

Another charge that the ITF report levies against alliances (but not against consortia generally) is that the current alliances have caused service reductions. In support of this claim, the report primarily relies on anecdotes and provides little data analysis to support the service degradation claim. The report does on page 28 (Figure 5) show a trend of lower weekly service frequency on the Asia-Europe route from 2012-2017. However, that discussion fails to acknowledge that the total capacity available to shippers on that route has increased during that same period.<sup>2</sup> The fact that the trend lines for frequency of service and total amount of service cross is due to the introduction of larger, more efficient vessel in that trade, which is the trade with the highest use of large vessels because of the large cargo demand and the ability of ports to handle the larger vessels.

Another claim that the report makes is that service has declined over time with respect to transit time differentiation. In this regard, the report references Figure 4 at page 26 for the proposition (page 25) that: *“On the Asia-Europe trade lane, transit times of all alliance carriers are almost entirely clustered around 29 days in the second quarter of 2018, losing a lot of variety compared to previous years (Figure 4).”* The problem is that the report's own chart does not bear out the claimed loss of differentiation. Figure 4 shows shifting patterns of transit times over the years, but there are clear “clusters” in 2013 (30 days transit time), 2015 (32 days transit time), and 2016/2017(30 days transit time). The pattern that the report claims simply does not exist, and the report also fails to mention that the 29-day transit time “cluster” about which it complains is the fastest transit time cluster on the chart. That would appear to be a service improvement, not a service decline.

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<sup>2</sup> Analysis of data contained in the Quarterly Container Forecaster issued by Drewry Shipping Consultants shows that from January 2012 to October 2017, Asia-North Europe capacity increased 4% and Asia-Mediterranean increased 11% for a combined increase in the Asia-North Europe/Mediterranean lane of 7%.

Hidden in the middle of the discussion of carrier service is this broad caveat on page 25 of the report:

*“Limited reliability cannot exclusively be explained by alliance formation, or be fully attributed to liner shipping companies, as their reliability also depends on other stakeholders in the maritime logistics chain. Yet, the least that can be concluded is that alliances have not resulted in better reliability.”*

This honest statement speaks for itself, and along with the weakness of the service arguments undermines this component of the ITF report.

The fact is that, with or without consortia, liner shipping services will adapt to changes in cargo volumes over time, which can mean more or less service to any given port or on any given route from time to time, depending on economic conditions. This is evidence of a competitive marketplace, both for ocean shipping services and for port services. One objective, multi-factor measurement of liner shipping service is the UNCTAD Liner Shipping Connectivity Index, which can be accessed at: <http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=92> The clear trend during the 2004-2018 period covered by the UNCTAD analysis is that liner shipping connectivity has grown to serve what the market has demanded.

The other important point that is reflected in the UNCTAD index is that it is sensitive to changes in demand as well as changes in supply. Virtually all of the limited statistics regarding service in the ITF report look only at supply; there is no discussion about the fact that shifts of cargo from one port to another, or changes in service frequency or capacity levels occur in response to demand signals in the market. It is not the case that every port should experience increasing service forever. The relevant question with respect to service is whether needs are being adequately met. That analysis requires that both supply and demand be taken into consideration, something that the ITF report fails to do.

#### 4. Barriers to Entry

The ITF report (page 40) claims that: *“Alliances act as a barrier to entry on the main East-West trade lanes, in particular the Asia-Europe trade lanes.”* That assertion ignores the economics of

liner shipping. This sector has high fixed costs associated with the need to invest in sufficient vessels to provide a regular scheduled service. Alliances have not increased those costs: on the contrary, they lower barriers to entry by enabling carriers to access the capacity of other operators in order to achieve economies of scale and scope that they could not achieve on their own. The report contradicts its own claim that alliances increase barriers to entry by stating (p.20) that: *“Alliances have made it possible for smaller players to get access to big ships that they would otherwise not have had.”*

The report’s real complaint seems to be that liner shipping is a capital-intensive industry in which size matters in terms of carriers’ abilities to participate in the highest volume trades. But this is simply a fact of the market.

#### 5. Trends in Regulation

The ITF report (page 79) claims that *“repeal of the EU consortia block exemption would be in line with a growing trend in countries to limit special treatment of shipping,”* but it does not cite a single country that has chosen to repeal its existing legal recognition of consortia or vessel sharing arrangements (VSAs). Indeed, after a detailed discussion of the recent review in New Zealand, the report concludes that in that country *“the generic antitrust rules will apply to all activities in the shipping sector, with the exception of operational and vessel sharing agreements, which will continue to be subject to a block exemption.”* (p.78, emphasis added) The Report elsewhere recognizes – as it must – continued legal certainty for VSAs in Hong Kong, India, the United States, Israel, Japan, Singapore, Malaysia, South Korea, Canada, and Australia. (Page 73, Table 6).

In addition to setting the record straight with respect to the inaccurate presentation in the ITF report, proper recognition of the regulatory treatment of consortia in non-EU countries that trade with the EU is important in its own right. To state the obvious, shipping is by its nature an international business, and shipping lines must comply with the law everywhere they go. Especially because the networks that sustain international liner shipping services depend so heavily on different forms of vessel sharing, it is critical to have as much legal uniformity as possible across jurisdictions with respect to those vessel sharing arrangements. To have legal certainty on one end of a trade lane means nothing if the country on the other end does not also

provide clear rules. In this regard, the EU consortia block exemption regulation has been viewed by multiple countries as a model or starting point for liner shipping regulation. Having that common base provides a shared frame of reference in terms of interpretation and implementation of the rules in each country. This in turn allows lines to more flexibly and quickly make use of vessel sharing arrangements to increase the coverage and efficiency of their services in response to market demands.

## 6. A Final Word on the ITF Report

We open our critique of the ITF report with the observation that the report focuses too narrowly. Specifically, it focuses exclusively on global alliances, which are largely not covered by the BER, and it entirely ignores the far greater number of vessel sharing arrangements that are covered by the BER. Such a misplaced analysis cannot be the basis of a decision whether to keep or discard the regulation.

We close our critique of the ITF report with the observation that the report is too narrow in another respect. The report describes at some length (pages 23-27) a hypothetical world in which carrier services are offered and differentiated in a number of ways that are different from today's market. What that discussion fails to consider is whether the market would welcome or even allow the changes that the report hypothesizes. Put differently, the report seems to assume either that individual carriers have full freedom to tailor their services to some theoretical ideal irrespective of real-world market forces or alternatively that carriers can collectively decide to re-make the market in some new shape. Neither scenario is realistic or possible. Carrier and shipper decisions are taken in response to market forces that prioritize certain aspects of ocean transportation over others. Thus, even as the ITF report paints a picture of a world that it would prefer, it admits (p. 27) that "*[i]t has been observed that shippers can express demands that they are actually not willing to pay for.*" Indeed, that is the case, and carriers must make a living in the revenue environment that the market will support.

The failure of the ITF report to give full consideration to whether the hypothetical market that it posits is feasible is compounded by the fact that the report also fails to consider whether such a hypothetical market would be preferable even if it were achievable. Would investment in smaller and less efficient vessels resulting in higher operating costs and lower capacity achieve a better

outcome for shippers, consumers, or terminal operators? Would additional air pollution and CO<sub>2</sub> emissions associated with a less efficient transportation system be a preferable outcome at a time when the EU and the IMO are working diligently to reduce those emissions? Would having carriers reduce or abandon vessel sharing in favor of single-operator services providing fewer competitors per trade lane and less overall connectivity be better for shippers or consumers?

These are critical points, because the report nowhere tries to explain what practical changes in the structure of the industry the authors would wish to see, and the Report nowhere explains the mechanism by which a change in regulatory policy would bring about that alternative industry structure. If the Report's recommendations would have no effect, then the report should be ignored. If adoption of the report's recommendations would undermine the industry structure that has consistently expanded service and reduced costs to shippers – as the industry is convinced would be the case – then the ITF Report's recommendations should be rejected as counter to good competition policy, good transportation policy, and good trade policy. The authors of the ITF report may have the leisure and freedom from policy responsibility that allows them to propose policy changes without owning the consequences of those recommendations. The Commission does not share that latitude.