Joint Submission in response to the consultation by DG Competition of 20 November 2019 on its proposed prolongation of the Consortia Block Exemption Regulation (CBER) based on its findings in the Evaluation of the CBER presented in the Staff Working Document by CLECAT, FEPORT, ESC and ETA

Introduction and Summary

This legal analysis has been prepared for CLECAT, FEPORT, ESC and ETA in relation to the Commission's proposal published on 20 November 2019 to prolong the existing block exemption of liner shipping consortia (i.e. the Consortia Block Exemption Regulation, "CBER") from the application of Article 101 of the Treaty on the Functioning of the European Union[1], without any modifications to the version of the CBER prolonged in 2014.

The purpose of this Joint Submission is to challenge the legal grounds for the conclusions of the Evaluation of the CBER in the Staff Working Document (SWD)[2]. It takes the form of a legal analysis (procedural and substantive) exposing the fundamental flaws in the SWD, and in particular in relation to the five criteria applied in the SWD Evaluation on which the reasons for its conclusions on the CBER are based:

- Its effectiveness in facilitating consortia agreements in the market place
- Its efficiency in reducing compliance costs to carriers
- Its relevance in the current market conditions
- Its coherence with other aspects of EU competition law and wider policies
- Its added value to the role of the EU as competition regulator

The legal analysis is made taking into account the Commission's latest Consultation Summary[3] and its Evaluation Roadmap describing the context, purpose and scope of the Evaluation as well as the Better Regulation Consultation Strategy[4] including data collection and methodology. The next section highlights the lack of transparency of the consultation over a period of nearly two years and its failure to focus on the market developments relevant to the application of Article 101(3) by a BER.

In summary, it will be demonstrated that the Commission has failed:

(1) to obtain the relevant price and market share data and information readily available from the carriers to enable it to review the operation of the CBER in the light of the major developments in the industry since the last review in 2014;

[1] 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 L256/2009, 29.9.2009, p.31-34.

[2] European Commission SWD (2019) 411 [412] final, 20.11.2019.

[3] See, for example, "Consultation strategy for the evaluation of Consortia Block Exemption Regulation" relating to the consultation period to be launched in Q3 2018 on DG Competition's website , and the more recent entry on the DG Competition website "Consultation on the evaluation of the consortia Block Exemption Regulation, from 27.09.2018 to 20.12.2018.

[4] Ares(2019)7161206, the "Evaluation Roadmap" on the DG Competition website with a start date of Q2 2018 and end date of Q4 2018, stating in the section on B. Better Regulation, Consultation strategy that "An evaluation Staff Working Document will be published in Q4 2018". In fact, the SWD was not published until 20.12.2019.

(2) to recognize that a BER is the application of competition law by legislation of general application to a category of defined agreements but is not a self-standing law in the same way as standard EU legislation subject to the EU Better Regulation policy and the related Evaluation process;

(3) to assess the five Evaluation criteria accurately and in a balanced way, in any event, in particular because of the failure to obtain the available relevant data and mainly by ignoring important changes in the liner shipping market since 2014. Without any, or at least any adequate explanation, the SWD has wrongly excluded, Global Alliances from the evaluation of the CBER. Alliances have through investment in ULCV's -largely changed the economics of international liner shipping, which in turn has changed cost structures for logistics and infrastructure providers;

(4) to recognize, despite the evidence provided in the relevant ITF reports including its report on the Impact of Mega ships (2015) and the more recent ITF study on liner shipping alliances, that the reduced possibility of costs rationalisation has resulted in a continuous deterioration in the quality of service and therefore an erosion rather than increase in economic benefits to share with users;

(5) to analyze the impact of liner shipping consortia on ports operations and landside transportation.

Commission Summary of Consultation

The Commission's Consultation Summaries and its various Evaluation Roadmaps describe the context, purpose and scope of the Evaluation as well as the Better Regulation Consultation Strategy including data collection and methodology.[5] The roadmaps raise questions about the timetable followed by the Commission since the consultation period is said to have ended in December 2018 (when the Roadmap stated that the Evaluation Report would be published) but the Evaluation in the form of the SWD was not published until 20 November 2019. It is not clear what happened in the intervening period and whether or not the Commission changed its conclusions.

However, the Commissions Consultation summaries and Roadmaps highlight how the Commission's has wrongly given precedence to the five Better Regulation criteria rather than focused on reviewing the competition law issues relevant to any prolongation of a 25 year old BER, and whether it still complies with the four conditions for exemption in Article 101(3). In particular, the SWD has paid too much attention to the carriers' arguments about the legal costs of competition compliance rather than carried out a thorough analysis of the relevant major market developments since the last review started in 2013.[6]

[5] See, Footnotes 3 and 4 above.

[6] **Purpose of the document**

The purpose of this evaluation is to assess whether in view of the general policy of harmonizing competition rules and considering the major developments in the liner shipping industry in recent years, the Consortia BER is still relevant and delivering on its objectives, and whether it is doing so in a coherent, effective and efficient manner, creating EU added value. This evaluation will inform the decision of whether to let it expire or prolong it and if so, under which conditions. Allowing the Consortia BER to expire would not mean that consortia agreements would become unlawful, but that they would be examined under the general rules on competition just as cooperation agreements in other sectors. (emphasis added)

The criteria that the Commission will apply in its evaluation of the current Consortia Block Exemption Regulation are:

Effectiveness: considering the major developments in the industry, does the Consortia BER still facilitate economically efficient cooperation that also benefits consumers?

Efficiency: what is the effect of the Consortia BER on costs? Does it help undertakings to cut costs or conversely does it increase compliance costs? Which policy option would cause less burden or complexity?

Relevance: is the Consortia BER still relevant considering the major developments in the industry and the modes of cooperation between carriers?

(1) The Commission has failed to obtain the relevant price and market share data and information readily available from the carriers to enable it to review the operation of the CBER in the light of the major developments in the industry since the last review in 2014.

The Commission's current legal conclusions regarding the limitations to the Evaluation Assessment methodology, the first type consisting in "the objective limitations of data collection" which it says were most pertinent to the collection of overall service price and the calculation of precise market shares, because of the role of business secrets (See, Section 4.3, pages 15 to 16), ignores its use of targeted questionnaires sent to six carriers. However, as there is no non-confidential summary of the four carrier responses that the Commission appears not to have received, but which should have been required, it is interesting to note the questions asked by the Commission in the carrier targeted Questionnaire used in the last CBER review in 2013. Here, the Commission's approach was to obtain information through formal requests for information under Article 18(2) of Council Regulation 1/2003 used in its targeted questionnaires sent to stakeholders, including the Questionnaire to Carriers,[7] as part of its information gathering procedure in 2013 for its 2014 review of the CBER.

- **The 2013 Request for Information Covering Letter**

The 2013 Request for information to carriers reveals how the Commission does not appear to have followed the normal procedure available to it in the present review of the CBER to obtain the relevant price and market share data from the carriers that it says it does not have for its evaluation in the SWD:

1. The objective of the review is to establish whether the conditions attached to the block exemption regulation on maritime consortia (the "Consortia BER") continue to be in line with present day market conditions and fulfil the four cumulative conditions of Article 101(3) TFEU.

2. In order to achieve this objective, the Commission is dependent on information received from stakeholders. We would be grateful if you, as a carrier, could provide the information requested in Annex 1. This information will assist the Commission in establishing the most appropriate legal framework for the application of competition rules to liner consortia, in full knowledge of the facts in their economic context.

3. Please be assured that the Commission will not disclose the information you provide to third parties, if you so request, [and supply a non-confidential version of any business secrets or confidential information] and will not use it for any other purpose than that of reviewing the Consortia BER.

4. This letter is a formal request for information made in accordance with Article 18(2) of Council Regulation No 1/2003, of which the relevant extracts are attached (Annex IV). Article 18 empowers the Commission to require undertakings and associations of undertakings to provide all necessary information whether or not they are suspected of any infringement of the competition rules." (emphasis added)

Coherence: Is the Consortia BER coherent with the general policy of harmonizing competition rules and replacing sector-specific rules with measures (BERs or guidelines) providing general guidance on the application of Article 101 TFEU?

EU added value: what is the added value of the Consortia BER considering the Commission's measures of providing general guidance on the application of Article 101 TFEU?

[7] HT.3754 – Review of the 2009 Block Exemption Regulation for Liner Shipping Consortia (Consortia BER)

1.1 Commission failure to use its power to request information from carriers properly under Article 18(2) Council Regulation 1/2003

The Commission's defective procedure failing to use its power to request information from the carriers makes it impossible for other stakeholders to comment on the data that it says it has used because it claims, on the one hand, that "the overall (final) prices cannot be established or calculated with precise certainty. Similarly, it was not possible to calculate carriers' market shares with full precision. This is due to the possible divergence between capacity and volume figures (known only to individual carriers), and to the fact that the information is not granulated enough to have accurate market share calculations."(emphasis added). On the other hand, the Commission seems to contradict the evidential issue that it has identified by concluding: "however, considering information in the context of its activities in the sector, i.a, merger control decisions, this first type of limitation is not expected to have any material impact on the evaluation." (see SWD, Section 4.3 page 16). Not only has the Commission not revealed what particular information it has received in the context of recent maritime merger control filings, but this information is unlikely to be as complete as the carriers could each provide if sent an appropriate Request for Information (RFI) under Article 18(2) of Council Regulation.

As the Commission SWD demonstrates, it is unclear which consortia are still covered by it since it is difficult to monitor whether or not the 30% market share threshold condition is met. One of the reasons for this legal uncertainty is that the Commission uses the "combined market share" of the consortia lines on a specific trade, which takes into account the complicated cross-linkages between consortia. Olaf Merk, in his article of 17 December 2019, emphasises this problem by reference to his Figure 3 "Ranges of uncertainty on combined market shares on consortia covering Europe" which sets out the range of possible market shares on the trades serving Europe. As the parties to this Joint Submission, he concludes that the Commission recognises that it does not have the necessary data to reach the conclusions it does in its SWD and that collecting it from the carriers would help to provide legal certainty.

1.2 The burden of proof that the CBER applies to their agreements rests on the carriers

Paragraph 35 of the Guidelines on the application of Article 101(3) TFEU states that the parties to an agreement are relieved from their duty under Article 2 of Council Regulation 1/2003 to show that their agreement fulfils the four cumulative conditions for exemption in Article 101(3) where they can prove that their agreement meets the conditions of an applicable BER. This means that the carriers bear the burden to prove that their consortia agreements meet the conditions of the CBER. As the Commission says the carriers have not provided it with sufficient relevant price and market share data, the carriers have not satisfied the burden of proof. The Commission, therefore, has no legal grounds for concluding in the SWD that the CBER is relevant in the changed market conditions since 2014, nor effective or efficient. Moreover, the further market changes, including market definition, recently anticipated by Commission Senior Vice-President Vestager resulting from globalisation and digitalisation would require the carriers to provide evidence relating to the dominant role of end-to-end services and future market developments, such as connected digital information services.

- **The 2013 Carrier targeted Questionnaire**

The Questionnaire to Carriers annexed to the letter RFI, illustrates its purpose and provides examples of questions regarding market data that the Commission needs to obtain from the carriers, even now, if the current CBER review and evaluation are to be legally valid.[8]

[8] **A. Purpose of the request**

The purpose of this questionnaire is to assess whether the block exemption regulation on maritime consortia (the Consortia BER) adequately reflects current market reality…" (emphasis added)

The Questionnaire asks the carriers to list for each trade on which the consortium operates the five major competitors to the consortium and to estimate the market share that they have on each trade.

It is to be noted that this question is highly relevant as it indicates that the Commission considered in 2013 that it expected there to be five major competitors on each consortia's trade in order to meet the condition of effective competition required for exemption by Article 101(3) TFEU. It follows that today the market has totally changed in certain trades such as Asia-– North Europe. Here the four competitors are said by the WSC to account for only 1% of capacity. This means that effective competition has been eliminated by the consortia operating on that trade, namely the three Global Alliances.

The Questionnaire also asked the carriers what are the economic considerations at the basis of the industry trend towards increasing vessel size and capacity and does this trend have an impact on the incentive to enter into consortium agreements. This is a key question that the Commission does not appear to have asked the carriers in the course of the present lengthy consultation, while apparently not accepting the view of ITF and the four parties to this Joint Submission that, but for the CBER, the carriers

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C. Questions

I. Contact details and undertaking information market share

5. Please list your ten main clients in terms of volume for the three last years." (emphasis added)

II. Questions regarding consortia to which your company participates

6. Please list all liner-shipping consortia to and from Europe in which your company participates. Please also indicate the trade(s) on which they operate. (emphasis added)

7. Please provide copies of each of the consortium agreements... (emphasis added)

8. Please submit the service schedules of each consortium, including all ports of call. (emphasis added)

...***Transport capacity and volumes***

15. Please indicate your estimation of the total transport capacity (in TEU) of each trade on which the consortium operates for the years 2010, 2011 and 2012. (emphasis added)

16. ...total transport capacity of the consortium (in TEU) on each trade...

18. ..estimation of how much cargo (in TEU) was carried in total on each trade...

19. ...how much cargo (in TEU) the consortium as a whole carried on each trade...

1. 20. ..how much cargo (in TEU) your company carried within the consortium, and if different the total transport capacity of your company, for each trade

21. ...how much cargo (in TEU) your company carried on its vessel(s) on behalf of other members of the consortium ...distinguish between space that was (i) exchanged, (ii) sold or (iii) cross-chartered.

Competitors

22. Please list for each trade on which the consortium operates the five major competitors to the consortium. Please estimate the market share that they have on each trade. (emphasis added)

Port terminals (35, 36)

Computerized data exchange systems (37)

...***Individual Service Contracts or equivalent*** (42 – 44) ...

III. Questions regarding the Consortia Block Exemption...

52. What are the economic considerations at the basis of the industry trend towards increasing vessel size and capacity and does this trend have an impact on the incentive to enter into consortium agreements? Please explain? (emphasis added)

would not have continued to invest in ULCVs and collaborated in three mega Global Alliances, as well as consolidating the market through mergers.

1.3 World Liner Data Limited has been ignored

Further, as the ITF clearly explains in its 2019 Report ("Container Shipping in Europe: data for the Evaluation of the EU Consortia Block Exemption Regulation", page 10 and Box 1), the World Liner Data Limited (WLDL) collects and manages the volume and rate data of its 18 global carrier members. The Commission needs to use its power to request information under Article 18(2) of Council Regulation 1/2003 to obtain all the WLDL data that it needs for its evaluation of the CBER. In particular, the Commission needs to obtain and verify all the relevant commercial data included in the WLDL database as identified by the ITF 2019 Report Box 1, on page 10, and the terms of the information exchange agreements which expressly extend to discussions and meetings, reminiscent of the Voluntary Discussion Agreements (VDAs) that the carriers have operated until recently on Asia and Pacific trades, such as the now defunct Transpacific Stabilisation Agreement.

The Commission support for the carriers' promotion in other jurisdictions of co-operation agreements relying on the CBER, (see paragraph 5.5, page 33, "EU added value") is misplaced. The carriers have abused the precedent of the CBER in jurisdictions such as Singapore and Japan which allow Voluntary Discussion Agreements (VDAs, including prices). However, the tide is turning after the Hong Kong Competition Authority rejected the carriers' lobbying for a BER for VDAs using unattractive written threats not to call Hong Kong, available on the Hong Kong authority's website. The situation in Australia may result in stricter application of the competition rules by the ACCC but the carriers may successfully pressurize Australia with threats of excluding Australian ports just as they pressurized New Zealand to go beyond the CBER and allow shipping cartels when they had proposed reforms, because these countries' ports are not generally of a sufficient size to take ULCVs.

The evidence to date is that the carriers have used the CBER as a basis to extend the exemption to Voluntary Discussion Agreements, which include prices. The Commission should be obtaining the relevant information on the WLDL agreements and the Carriers discussion powers to see if they provide for the discussion of prices in Europe either directly or through the application of the effects doctrine, which gives the Commission jurisdiction over agreements made overseas but which have the effect of restricting competition within the EU.

1.4 Mega ships preclude further carrier cost rationalisation

As indicated in the ITF market reports referred to by the Commission, but only in part, in its Evaluation Report, this data will confirm that port to port rates have not decreased since the last review of the CBER in 2013/2014 despite the continuing global economic difficulties caused by the banking crisis of 2008. It will also show that any rationalisation from investment in mega ships or Ultra Large Container Vessels (ULCVs) has not been passed on to users, largely because the carriers costs have increased rather than enabled any rationalisation, as required by the CBER. (The SWD actually notes that carriers' costs have reduced by 2% more than their port to port rates.) The ITF has rightly questioned whether in fact the introduction of ULCVs will increase the carriers' costs because no further rationalisation is feasible, undermining the rationale for exemption relied upon by the CBER. The SWD does not address this key issue for the relevance of the CBER.

1.5 The Commission has ignored the impact of miscellaneous charges and surcharges in its evaluation

Freight charges are a relatively small element of the total shipping costs and carriers. It is felt that the carriers abuse their strong position by creating a plethora of surcharges and miscellaneous charges that can be directly linked to the sea freight leg and are clearly part of it. Often, the consignee in the bill of

lading is left with no other choice but to pay related charges in order to avoid delays that would have a more serious impact on the supply chain.

Apart from surcharges and miscellaneous charges there are examples and recent court cases which demonstrate that shipping lines also abuse their position when it comes to demurrage charges. The Federal Maritime Commission of the USA has recently identified how shipping lines take unreasonable advantage of their position (Federal Maritime Commission, Interpretive Rule on Demurrage and Detention under the Shipping Act, 46 CFR Part 545, Docket No. 19-05, RIN:3072-AC76). A number of carriers have reported profits that are very much related to the charging of surcharges and demurrage charges.

1.6 The importance of carriers own self-assessments as a key source of relevant evidence for the Commission's evaluation of the CBER

If the Commission obtained the carriers' own self-assessments regarding the application of the CBER to their consortia agreements, they will show whether the three global Alliances meet the market share threshold condition on any of the trades that they serve, Alliances may only fall within the scope of the CBER if they are treated as multiple consortia agreements with the individual or linked consortia agreements on each trade lane being assessed separately by trade route. It follows that the Commission has failed to establish that the BER is relevant in the container liner shipping market because it has failed to establish data on the prevalence of consortia – footnote 79 in the SWD on the difficulty to establish market shares is an admission that compliance with the BER is not enforceable.

(2) The Commission has failed to recognise that a BER is the application of competition law by legislation of general application to a category of defined agreements but is not a self-standing law in the same way as standard EU legislation subject to the EU Better Regulation policy and the related Evaluation process.

For this reason alone, the Commission has asked itself the wrong questions by limiting its "review" of the CBER to the five Better Regulation Evaluation criteria, and in particular by putting the main emphasis on the "effectiveness" rather than the "relevance" of the CBER. In any event, its analysis of effectiveness results in an unrealistic answer to the question whether the self-assessment required to be undertaken by carriers to satisfy themselves that the CBER applies to their cooperation agreements saves the undertakings significant legal fees when compared to a general competition self-assessment exercise, in the absence of the CBER.

2.1 Commission failure to take into account the significance of the change in legal nature of BERs since the first 1995 CBER following modernisation of competition law in 2004 despite noting it in the SWD (paragraph 2.1, page 4)

The introduction of the Better Regulation process of Evaluation into the review of the CBER has also resulted in the Commission failing to take into account that the very concept of a BER has changed since the modernisation of EU competition law in 2004 by Council Regulation 1/2003. This Regulation repealed Regulation 17/62 and abolished the system of notification driven by the Commission's monopoly of the power to exempt agreements under Article 101(3) which restrict competition under Article 101(1). The monopoly power itself was abolished so that national competition authorities (NCAs) and national courts may apply Article 101(3) to treat agreements as exempt, as may undertakings themselves through the process known as self-assessment.

2.1.1 CBER was not supposed to provide administrative efficiency for the Commission or carriers since 2004

The administrative efficiency of BERs which is assumed by the SWD to have benefitted the Commission in terms of saved administrative resources, as much as the Undertakings concerned who did not need to prepare a notification, was derived from the removal of any need to notify an agreement to the Commission before an individual exemption decision could be granted. The system of the CBER was not created to save undertakings from an individual self-assessment process, because self-assessment was not part of the procedure relating to exemption in 1995 when the Commission adopted the first CBER (Commission Regulation 870/95) on the basis of the Council Enabling Regulation 246/2009.

2.1.2 CBER still requires ordinary self-assessment under Article 101(1)

Just as the Commission could not grant an individual exemption decision to an agreement notified before 2004, if the notifying parties could not demonstrate that the agreement in question appreciably restricted competition (there was the possibility of what was called a negative clearance decision but in most cases of this type the Commission sought to save resources by issuing a non-legally binding so called comfort letter), nor can the CBER apply if the agreement in focus does not restrict competition.

2.1.3 CBER guidance for self-assessment

The only difference between self-assessment with the CBER available as guidance and the ordinary self-assessment process is that the undertakings have to assess for the application of the CBER whether their agreement falls with the scope of the definition of a consortia agreement by virtue of their operational cooperation constituting a "joint operation of a maritime transport service" (what the Commission calls a "joint service") under Article 2. They must also limit any restrictions to activities that do not go beyond those listed in Article 3, subject to the exclusion of hardcore restrictions by Article 4 and meet the conditions specified in Articles 5 and 6 in relation to the 30% market share threshold and termination provisions.

2.1.4 Argument against affirmation by Commission that ordinary self-assessment is not targeted and therefore provides legal uncertainty

For a general self-assessment, the undertakings have to assess their agreement against the four conditions for exemption in Article 101(3) without the benefit of the CBER sector specific application of those conditions but using other available guidance. This would normally include Commission (but there is none since 2014) and European Court past practice, as well as other BERs and Guidelines relating to horizontal cooperation agreements and joint ventures. However, this does not mean that the application of Article 101(3) established by the CBER is irrelevant to the interpretation and application of Article 101(3) to consortia in future. Provided that the four conditions for exemption are met, the same criteria as included in the CBER are likely to justify exemption on a self-assessment.

This is confirmed by the Commission in the section of its Road Map set out above on the Purpose and Scope of the Evaluation process:

"Allowing the Consortia BER to expire would not mean that consortia agreements would become unlawful, but that they would be examined under the general rules on competition just as cooperation agreements in other sectors." (emphasis added)

2.2 Prevalence of consortia to which the CBER does not apply

The real question is whether there are any consortia left on trades to and from the EEA which would satisfy the conditions for exemption in the CBER. The SWD accepts the ITF evidence (ITF EU Report, page 13 and Annex 1) that only 9 (or 15%) of the 61 consortia identified by the WSC (WSC et al Submission, 20 December 2018, page 5 and Annex 1) actually are covered by the CBER clearly. While it may be that a further 20 (making 29 or just under 50%) are covered, this is not clear (and so will require

self-assessment), while 7 (9%) have a market share above 30% so fall outside the CBER and clearly will require self assessment under Article 101(3) (SWD, section 5.3.1 Prevalence of consortia, page 20).

2.3 CBER does not improve legal certainty (effectiveness) because of the difficulties, even the Commission acknowledges it has, in establishing exact market shares

The Commission notes in Section 5.3.1, footnote 79, that "...it is however difficult to estimate the exact market shares of consortia due to lack of accurate data on transported volumes and the complex network of cross-membership between consortia." If the Commission is correct, it raises the question as to how the CBER can improve legal certainty and be more effective and efficient than ordinary self-assessment under Article 101? It is the market share of consortia that indicates whether there is an appreciable effect on competition for Article 101(1) to apply and to ensure that there is effective competition from other carriers for Article 101(3) to exempt any restrictions.

2.4 Small consortia do not need the CBER, falling outside Article 101(1) because they do not normally restrict competition appreciably

In any event, the majority of consortia, as indicated by the Commission are likely to involve carriers outside the top 10 or 12, which used to be 20, that account for 95% of global trades. These consortia agreements are likely to benefit from the De Minimis Notice (ignored by the Commission) because their market shares, as competitors, will not exceed 10%, as determined by the Notice on Minor Agreements (Commission Communication: Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) on the Treaty on the Functioning of the European Union, August 2014, paragraph 8, OJ 2014 C291/1, 30.8.2014). This first stage of self-assessment must be engaged in by all consortia agreements to establish whether the agreement in question restricts competition and is unaffected by the CBER. As in the analysis of joint purchasing under the Horizontal Guidelines (which implies that generally joint purchasing will only appreciably restrict competition where the parties to the agreement enjoy market power), referred to by the SWD, consortia agreements between parties who lack market power, and who could not compete on a trade in the absence of cooperation, will not necessarily involve any restrictions of competition, including so-called object restrictions. Moreover, this approach simply involves a calculation, and indeed reasonable estimate, of the market shares of the parties to the relevant consortia agreements.

The Commission's analysis of efficiency gains in the SWD is very weak as it is simply quoting the cost of compliance of one specific carrier. The Commission accepts the argument that it is expensive to exercise self-assessment as an efficiency benefit. However, this argument is not of specific relevance to the liner shipping industry but would apply to any industry which would be given a BER.

(3) The Commission has failed to assess the five Evaluation criteria accurately, in any event, because of the failure to obtain the available relevant data, ignoring the market trends since 2014. In particular, mega ships, or ULCV's, and Global Alliances have made major changes to the economics of international liner shipping. The reduced possibility of efficiencies through rationalisation and the inevitable erosion rather than increase in economic benefits to share with users in terms of increased ports of call and sailing schedules and port delays resulting in the deterioration of the quality of services have all been clearly established by the evidence in the ITF reports.

These flaws mainly relate to the Commission's failure to obtain the relevant available evidence from the carriers and to take into account the major recent developments in the liner shipping industry, of which it has ample undisputed evidence in the ITF reports on Mega Ships and Alliances, culminating in its 2019 CBER submission. The major recent developments include concentration through mergers, consolidation of market power through Alliances culminating in three global Alliances and the self-inflicted overcapacity caused by misguided investment in mega ships, or Ultra Large Container Vessels (ULCVs), peaking now at 22,000 TEUs. It is clear that these developments have been driven by the

underlying belief that individual vessel owners, such as the world's largest carrier Maersk which lead the race to maximise the barriers to new entry (despite no new entry for 40 years), would be able to misuse the parameters of the CBER designed for a bygone age of vessels below 5,000 TEUs, to share the cost burden with other carriers rather than rationalise costs and share the savings with customers through reduced prices and/or increased service quality.

3.1 No more cost rationalisation, reduced service quality for users, discrimination favouring carrier haulage over merchant haulage and squeezed prices for ports and tug services

The CBER was adopted when rationalisation in consortia involved sharing the increased number of vessels necessary to provide a frequent reliable service with extended port coverage which few individual carriers could provide alone, rather than sharing a small number of excessively expensive mega ships, with no longer any scope for cost savings, and therefore for rationalisation. The CBER and Article 101(3) with which it is must be consistent may not benefit agreements which do not involve rationalisation which can be shared with customers. The CBER, therefore, may not benefit agreements that result in reduced sailing schedules and fewer direct ports of call, reducing choice and standardising service quality (in particular, because the contractual right of shippers and freight forwarders to choose their carrier no longer applies), causing disruption to the supply chain through blank sailings increasing shippers costs in warehouse storage for just-in time customer commitments and delays in ports. Ports are forced to bear the additional infrastructure and cost externalities to avoid the risk of losing their carrier customers to competing ports. Port service providers are forced to accept lower prices for their services because of carriers' joint purchasing market power. Equally, freight forwarders who compete with shipping lines for container haulage transport are exposed to shipping lines abusing their market power to discriminate in favor of carrier haulage, giving preferential treatment to their own subsidiaries involved in the door to door movement of containers. In this context, carrier haulage charges are cross subsidized by ocean freight related charges and surcharges given the benefits of the CBER that freight forwarders do not enjoy. The business has evolved and for any extended CBER the market changes must be taken into consideration to ensure that the CBER and data exchanged between shipping lines remain related to port to port data as competitors related to haulage services do not have the benefit of the CBER.

3.2 Elimination of effective competition

The market power that comes with consolidation and simultaneous competitor co-operation is the consequence of the investment by the few mega global carriers in ULCVs and the associated elimination of effective competition on the trades where they operate. It is hardly surprising that there is no effective competition on Europe's most important trade lane, Asia-North Europe, where the Commission SWD accepts the WSC evidence that there are 4 services competing with the three global Alliances on that trade, but that they enjoy together 1% market share, leaving 99% to the Alliances.

3.3 Alliances are subject to the CBER but increasingly have acquired significant market shares giving them market power so that they are required to carry out self-assessment, making the CBER irrelevant

It is equally disturbing that the Commission SWD concludes that Alliances are irrelevant to its evaluation of the CBER because two of the Global Alliances fall outside the 30% market share threshold on certain trades. The Commission has ignored the relevant papers produced by the ITF in the last five years since the last prolongation of the CBER. These have highlighted the competition issues raised by ULCVs and Alliances, and the role played by the CBER as a technical shield for their agreements which it encouraged, like the P3, but which in reality is a block exemption that has no longer any purpose.

Either the co-operation agreements have given too much market power to the carriers concerned so that the conditions for exemption in Article 101(3) are not met or the parties to consortia are minor

carriers whose agreements are unlikely to require exemption. Their market impact is such that it is unlikely their agreements appreciably restrict competition, and therefore are not contrary to Article 101(1) in the first place.

(4) The Commission has failed to recognize, despite the evidence provided in the relevant ITF reports including its report on the Impact of Mega ships (2015) and the more recent ITF study on liner shipping alliances, that the reduced possibility of costs rationalisation has resulted in a continuous deterioration in the quality of service and therefore an erosion rather than increase in economic benefits to share with users.

4.1 ITF evidence ignored by the Commission and carriers fail to satisfy their burden of proof

The Commission has not cited much of the relevant evidence relied upon by the ITF in its market analyses, especially regarding quality of shipper service and the threats to the continuing businesses of ports, tug owners and freight forwarders. For example, the SWD mistakenly assumes that increased Alliance capacity during the review period when blank sailings increased on certain trades automatically reduces the percentage of actual blank sailings as a percentage of actual cargo carried (SWD, Section 5.3.5.2, Services, page 31). Capacity does not necessarily, without further evidence, reflect cargo volume carried, especially because ULVCs are too big and only appear to require 60% utilisation to be viable. More importantly, since they need to provide the evidence to support prolonging the CBER, the Commission has made no effort to obtain the evidence available from the carriers through its "carrier targeted questionnaires" which it only sent to six carriers and received only four responses.

In the article published on 17 December 2019 as a personal blog by Olaf Merk (ports and shipping expert at the ITF), he explains by reference to his Figure 1 showing "Blank Sailings per month per alliance (2012 – 2019)" and his Figure 2 showing "Overlapping consortia links between carriers (for trades to/from Europe), "…most of the blank sailings – the cancellation of a scheduled weekly service – are done simultaneously by different consortia and alliances…While some interpret this as joint "capacity adjustments in response to fluctuations in supply and demand", others might suspect concerted action to influence freight rates. Because the different shipping consortia and alliances are heavily intertwined (Figure 2) even detailed coordination between them is not particularly difficult."

(5) The Commission has failed to analyze the impact of liner shipping consortia on ports operations and landside transportation.

The landscape of the liner shipping industry has changed in the sense carriers do not limit their services to port to port services; they also exchange data on services which relate to the port and land side which is made easier with developments in the area of big data and business intelligence and analytics – all of this not available to the liner shipping industry at the time of previous reviews of the BER. The impact of the ongoing vertical and horizontal integration is that the relevant market is no longer a port to port maritime transport service but can also relate to a door to door service. At the same time carriers have through the alliance (and consortia) in which they operate obtained increased buying power which allows them to pressurize their service providers, such as service operators in ports and ports, resulting in a reduction of choice and direct port connections (as confirmed in data from ITF). The Commission dismissed the significance of these developments and has failed to analyze the impact of liner shipping consortia on ports operations and landside transportation.

Conclusions

The carriers bear the burden to prove that their consortia agreements meet the conditions of the CBER. As the Commission says that the carriers have not provided it with sufficient relevant price and market share data, the carriers have not satisfied the burden of proof. It follows that the Commission has no

legal grounds for concluding in the SWD that the CBER is relevant in the changed market conditions since 2014, nor effective or efficient because the CBER does not provide legal certainty to the carriers.

The Commission, in concluding that the stakeholders, other than the carriers whom it believes without hesitation, have not proved their complaints, contradicts all the objective evidence gathered and analysis included in the ITF reports that the Commission cites with approval in the SWD. However, it has not cited much of the other relevant evidence relied upon by the ITF in its market analyses, especially regarding quality of shipper service and the threats to the continuing businesses of .port service providers and freight forwarders, which impact directly on the European economy and in particular imports and exports that are dependent on the European maritime logistics industry

In the light of the legal and procedural analysis above, it must be concluded that the Commission does not have sufficient evidence to reach the conclusions it makes in its SWD evaluation of the CBER.

Moreover, the further market changes, which require a review of market definition, as recently anticipated by DG Competition resulting from globalization and digitalization would also require the carriers to provide evidence relating to market definition developments in the liner shipping industry. This evidence will need to reflect the shift from port to port services to end to end services with all relevant prices and surcharges as well as future market developments, such as connected digital information services. The Carriers and the Commission will also need to address the concerns of CLECAT, FEPORT, ESC and the ETA expressed in this Joint submission. In particular the Commission needs to recognize that it has failed:

(1) to obtain the relevant price and market share data and information readily available from the carriers to enable it to review the operation of the CBER in the light of the major developments in the industry since the last review in 2014;

(2) to recognize that a BER is the application of competition law by legislation of general application to a category of defined agreements but is not a self-standing law in the same way as standard EU legislation subject to the EU Better Regulation policy and the related Evaluation process;

(3) to assess the five Evaluation criteria accurately and in a balanced way, in any event, in particular because of the failure to obtain the available relevant data and mainly by ignoring important changes in the liner shipping market since 2014.

(4) to recognize, despite the evidence provided in the relevant ITF reports including its report on the Impact of Mega ships (2015) and the more recent ITF study on liner shipping alliances, that the reduced possibility of costs rationalisation has resulted in a continuous deterioration in the quality of service and therefore an erosion rather than increase in economic benefits to share with users;

(5) to analyze the impact of liner shipping consortia on ports operations and landside transportation.

Because of these significant shortcomings, it is not admissible for the European Commission to simply extend the CBER for another four years. In those four years, the current CBER regime could cause serious and irreparable harm to the European maritime logistics sector. At most, the Commission should extend the CBER for one year, during which a proper review is conducted. If not, the Commission must let the CBER expire in April 2020.

Brussels
20 December 2019