



28 February 2020

Discussion Paper - Proposed Class Exemption for Ocean Liner Shipping

Submission to the Australian Competition & Consumer Commission (ACCC) on behalf of Freight & Trade Alliance (FTA) and the Australian Peak Shippers Associations

“KEEPING AUSTRALIA’S INTERNATIONAL TRADE MOVING”



Australian Peak Shippers Association Inc. (APSA)

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EXECUTIVE SUMMARY & RECOMMENDATIONS

An effective oversight of shipping line commercial practices is necessary for Australia's economic prosperity. While Free Trade Agreements and related trade facilitation initiatives have provided access to new markets, shippers (exporters and importers) will only be internationally competitive with access to regular, reliable and cost-effective shipping services.

The Australian Peak Shippers Association (APSA) membership (including businesses and associations) collectively export more than 600,000 twenty-foot equivalent unit (TEU) containers annually.

APSA is the designated peak shipper body granted status by the Federal Minister for Infrastructure and Transport under Part X of the *Consumer & Competition Act 2010* (Part X) to represent the interests of Australian shippers in relation to liner cargo shipping services.

Part X provides broad exemptions from competition law for registered shipping lines to coordinate with each other in transporting cargo to, or from, Australia. Part X has evolved over several decades having been first included in the *Trade Practices Act 1974* to address a concern that Australia, being geographically remote, was not sufficiently attractive as a destination for international shipping lines.

However, the 2015 Australian Competition Policy Review (Harper Inquiry), found that Part X is outdated and unnecessary, and that it should be repealed, with the Australian Competition and Consumer Commission (ACCC) to introduce a narrower 'class exemption' as a first step to its repeal.

Over the last thirty years, APSA has advocated for the retention of Part X in responding to the Harper Inquiry and the many formal reviews before it. However, further shipping line market consolidation over the last five years and the emergence of stevedore-imposed Infrastructure Surcharges has resulted in supply chain costs rapidly increasing, exposing significant deficiencies in the effectiveness of Part X in being able to achieve basic shipper protections and the need for modernisation of legislation.

State and Federal Governments need to take a more active role in protecting Australia's sea freight supply chain and on a need basis, introduce appropriate regulation.

APSA commends the ACCC for driving reform and looks forward to ongoing engagement to support our shippers compete in international markets with considered and appropriate regulation.

In response to the *Proposed Class Exemption for Ocean Liner Shipping* (discussion paper) published on 3 December 2019, APSA offers the following nine (9) recommendations for consideration by the ACCC:

RECOMMENDATION 1 – APSA recommends repeal of Part X with a block exemption regime administered by the ACCC that allow shipping lines to collaborate on operational matters only to achieve efficiencies in supplying jointly organised services.

Comment: Shipping lines should be subject to generic competition laws and upon application to the ACCC, be permitted to combine resources with demonstration of economies of scale, provision of lower-cost services, enhanced frequencies breadth of destinations.

RECOMMENDATION 2 – APSA recommends alignment with the block exemption arrangements established in New Zealand to form a regional approach to shipping line competition law.

Comment: Learnings need to be assessed from deficiencies of elements of European Union (EU) block exemption regime.

RECOMMENDATION 3 - APSA recommends that the block exemption regime retains minimum levels of service (MLS), negotiable shipping arrangements and minimum notification periods as currently provided by Part X.

Comment: An important element of Part X is that it provides minimum service levels and reduces the frequency and instances of blank sailings.

RECOMMENDATION 4 – APSA recommends the block exemption regime to exclude an ability to fix or coordinate freight prices and surcharges; pool or apportion earnings, losses or traffic; or restrict capacity (slots) offered.

Comment: These exclusions would minimise the risk of market manipulation.



RECOMMENDATION 5 – APSA recommends the block exemption registration process to mandate incorporation of stevedore supplier fees to be administered direct and solely against shipping lines (negating the practice of stevedore-imposed “Infrastructure Surcharge” administered against the transport sector).

Comment: This provision would reduce the adverse impacts of Infrastructure Surcharges by forcing commercial negotiations of services and price to be negotiated between commercial interests (i.e. stevedore with shipping line / shipping line with shipper).

RECOMMENDATION 6 - APSA recommends that the terms of the block exemption arrangements are drawn as narrowly as possible to permit the desired activities to be operationalised, and no more.

Comment: It is essential that shippers are not exposed to the risk of anti-competitive practices.

RECOMMENDATION 7 – APSA recommends the block exemption regime to introduce a registration process supplying core information to the ACCC to ensure compliance with any new statutory provisions.

Comment: A registration process would mandate the supply of key operational data to assess compliance with block exemption requirements.

RECOMMENDATION 8 – APSA recommends that it maintains its designated peak shippers’ body status to support the ACCC review applications for block exemption arrangements.

Comment: A continued role for APSA (and as required, secondary peak bodies as per Part X) would support the ACCC in assessing registrations in a contemporary operating environment.

RECOMMENDATION 9 – APSA recommends continuation of legal instruments to allow shippers to negotiate collective freight contracts with shipping lines.

Comment: This may be achieved via the new ACCC class exemption allowing collective bargaining by eligible businesses.

APSA looks forward to ongoing engagement with the ACCC and key stakeholders to ensure open competition exists in shipping services to best service the Australian trade sector.

ABOUT THE PEAK BODIES AND EXTENT OF REPRESENTATION

Freight & Trade Alliance (FTA) is a peak body for the international trade sector with a vision to establish a global benchmark of efficiency in Australian border related security, compliance and logistics activities.

FTA represents more than 375 businesses including Australia's largest logistics service providers and major importers. On 1 January 2017, FTA was appointed the Secretariat role for the Australian Peak Shippers Association (APSA).

The Australian Peak Shipper Association (APSA) is the peak body for Australia's containerised exporters and importers designated under Part X of the Competition and Consumer Act 2010 and by the Federal Minister of Infrastructure and Transport.

APSA is also a member and has board representation on the Global Shippers Forum (GSF) that represents shippers' interests and that of their national and regional organisations in Asia, Europe, North and South America, Africa and Australasia.

FTA / APSA provide international trade and logistics advocacy to the following associations:

- Australian Horticultural Exporters and Importers Association (AHEIA)
- Australian Cotton Shippers Association (ACSA)
- Australian Meat Industry Council (AMIC)
- Australian Council for Wool Exporters and Processors, and the Australian International Movers Association (AIMA)
- Tasmanian Logistics Committee (TLC)

The current APSA Officers and Committee of Management are listed below:

- Chair: Mr. Sean Richards (EGM- Logistics, Visy Industries)
- Vice-Chair: Olga Harriton (Global Logistics Manager – Manildra Group)
- Treasurer: Eimear McDonagh (Director- Australian Cotton Shippers Association)
- Patrick Hutchison (CEO- Australian Meat Industry Council)
- Flaminio Dondina (General Manager Procurement- Casella Family Brands)
- David Werner (Trade Execution Manager- Cargill)
- Michael Dunstan (Australian International Movers Association)
- Kurt Wilkinson (General Manager - Commercial Commodities & International Division - Fletcher International Exports)
- Peter Morgan (CEO- Australian Council for Wool Exporters and Processors)

A list of all members and further information about FTA / APSA is available at www.FTAlliance.com.au

INTERNATIONAL LINER SHIPPING

International liner shipping is focussed on achieving economies of scale to achieve positive financial returns resulting in investment in ultra large container ships with a capacity to transport over 18,000 TEUs.

Although there have been mergers in recent years, the major consolidation tendency has been the emergence of global alliances.

This has led to various concerns over the last decade about the competitive nature of the sector. Examples include the proposal for the alliance P3 (Maersk, MSC and CMA CGM) which was not approved by the Chinese Ministry of Commerce in 2014 on grounds of the dominant market position that P3 would acquire on the Far-East-Europe routes. The Federal Maritime Commission has also voiced concerns about 2M, the successor to P3, with a one of the commissioners opposing the alliance.¹

¹The Impact of Mega-ships OECD/ITF 2015



In more recent years, liner shipping have been able to navigate their way through international competition regulator's requirements with alliances becoming the dominant players on the main East-West routes involving Europe (North Europe, Asia-Mediterranean (Asia-Med), North Europe-North America East Coast and Mediterranean-North America East Coast (Med-North America East Coast).

Until 2015, all alliances combined held market shares below 50% on all of these four trade lanes, ranging from 49% (Asia-North Europe) to 0% (Med-North America East Coast). This changed in 2015 with the arrival of the 2M and O3 Alliances. The market share of non-alliances has decreased further in 2017 when container shipping witnessed the transition from four to three liner shipping alliances.²

Alliances increasingly raise competition concerns in what has become a concentrated market. The top four carriers accounted for 60% of the global container shipping market in 2018. The market share of the biggest carrier (19%) is larger than the market share of any global liner alliance before 2012, which signifies the different character of current alliances. Global alliances give more market power to carriers and have several implications. First, they represent barriers to entry on East-West trades; only the largest companies would be able to compete on price for Asia-Europe services outside an alliance structure. Second, alliances could function as vehicles for collusion between carriers, as they provide carriers with in-depth insights on the cost structures of their competitors. Thirdly, alliances give very considerable bargaining power to shipping lines regarding commercial negotiations with ports and stevedores.³

THE AUSTRALIAN SHIPPER'S PERSPECTIVE

Australian containerised imports and exports are dependent on foreign owned international shipping lines, many of which, including COSCO / OOCL, are state-owned enterprises. The Australian National Line (ANL) was sold to French giant CMA CGM in 1998.

The only guarantee of minimum levels of service (frequency of sailings to and from Australia, for example) our exporters have is through Part X of the Competition and Consumer Act 2010 (the Act).

The purpose of Part X is set out in s.10.01(1) of the Act:

“(a) to ensure that Australian exporters have continued access to outwards liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive; and

(b) to promote conditions in the international liner cargo shipping industry that encourage stable access to export markets for exporters in all States and Territories; and

(c) to ensure that efficient Australian flag shipping is not unreasonably hindered from normal commercial participation in any outwards liner cargo shipping trade; and

(d) as far as practicable, to extend to Australian importers in each State and Territory the protection given by this Part to Australian exporters.”

MINIMUM LEVELS OF SERVICE, NEGOTIABLE SHIPPING ARRANGEMENTS AND MINIMUM NOTIFICATION PERIODS

Whenever shipping lines enter into a conference agreement, Sec.10.07 of the Act specifies that these agreements *“must contain provisions specifying the minimum level of outwards liner cargo shipping services to be provided under the agreement”*. Parties to these agreements must negotiate these minimum levels of service with APSA as a requirement under the Act.

Minimum notification periods are an essential protection for Australian shippers. Sect.10.41(2) of the Act mandates that shipping lines who are party to registered conference agreements must provide the designated shipper body (APSA) with *“at least 30 days’ notice of any change in negotiable shipping arrangements”*. *“Negotiable shipping arrangements”* is defined in Sec 10.41 (3) (a) of the Act to include *“freight rates, charges for inter-terminal transport services, frequency of sailings and ports of call”*. This section of Australian law has some similarities to regulation in the U.S. under the Federal Maritime Commission (FMC) where the Commissioner requires that increases in rates, charges or surcharges (including new rates, charges or surcharges, as in the case of Low Sulphur Surcharges) must be published in a common carrier's tariff at least

² Container Shipping in Europe Data for the Evaluation of the EU Consortia Block Exemption OECD/ITF 2019

³ The Impact of Alliances in Container shipping –OECD/ITF 2018

30 days in advance of its effective date:

46 CFR § 520.8 Effective dates.

(a) General.

- (1) No new or initial rate, charge, or change in an existing rate, that results in an increased cost to a shipper may become effective earlier than thirty (30) calendar days after publication.
- (2) An amendment which deletes a specific commodity and applicable rate from a tariff, thereby resulting in a higher "cargo n.o.s." or similar general cargo rate, is a rate increase requiring a 30-day notice period.
- (3) Rates for the transportation of cargo for the U.S. Department of Defense may be effective upon publication.
- (4) Changes in rates, charges, rules, regulations or other tariff provisions resulting in a decrease in cost to a shipper may become effective upon publication.

PART X PROTECTIONS

Aside from Minimum Levels of Service, Part X does not currently provide Australian shippers with the broader level of shipper protection.

As outlined in a 2019 Senate Committee submission prepared by FTA / APSA⁴, examples of the ineffectiveness of Part X are included below:

- *In the last three years APSA has not been provided with a single notice of changes in 'negotiable shipping arrangements', even though there have been innumerable and material changes to key services, changes to rates and introductions of new surcharges and pricing mechanisms.*
- *In addition to not being notified of these service changes, APSA has identified a significant number of instances where shipping lines provided less than 30 days' notice to Australian shippers when changes are announced. In one recent case, the rollout of the Emergency Bunker Surcharge, U.S. shippers (with the strength of their regulation under the FMC), were given a 30 days minimum notification period and therefore extra time to comply, whereas Australian shipper received 4 days notification. See: <http://www.anl.com.au/news/701/anl-announces-the-implementation-of-emergency-bunker-recovery-measures>*
- *The 'negotiations' that APSA has participated in have not been a genuine form of engagement. While the Act requires shipping lines to negotiate, it does not compel them to agree. We have found that there is no appetite from the shipping lines to consider genuine protections for Australian shippers in these negotiations. APSA members have an interest in allowing these services to operate, therefore blocking the registration of these services is not an option.*
- *Even though shipping lines may take weeks or months in preparing a conference agreement, both APSA and the Registrar for Shipping only have 14 days to approve the application once received. These are often large and complex legal documents. In some instances, they represent the only direct sea freight service to certain markets for Australian exporters. It is risible that this short time period exists for the review, approval and negotiation of minimum levels of service. In addition to the above, the consolidation of the liner shipping market is creating a situation where many of these major shipping lines, by virtue of acquiring their competitors, are bypassing the need to register under Part X. In short, there is no need to form a consortium with your competitors if you are acquiring them. Unfortunately, this leaves Australian shippers utterly exposed, with shipping lines operating outside of Part X and not required to commit to or negotiate minimum levels of service.*

Australian shippers fear that increased consolidation may mean fewer carrier choices and less competition, making it harder for Australian shippers to negotiate rates and service levels.

The other impact of consolidation is that shipping lines are no longer captured under Part X protections. In the last three years, APSA has seen the dissolution of two out of the three major Discussion Agreements (DA) registered under Part X.

APSA notes the recent commentary provided by the Australian Competition and Consumer Commission (ACCC) Chair Rod Sims in terms of a need to repeal and replace Part X "*Internationally, a lot of other countries had similar broad shipping exemptions, but over the years, more and more have concluded that allowing*

⁴ Submission to the Senate Committee on Rural and Regional Affairs and Transport on behalf of Freight & Trade Alliance (FTA) and the Australian Peak Shippers Association (APSA) - Inquiry into the Policy, Regulatory, Taxation, Administrative and Funding Priorities for Australian Shipping - 8 March 2019



cartel behaviour by shipping companies comes at considerable cost to the local economy. As a result, several countries have scaled back or entirely removed their equivalent liner shipping exemptions.”⁵

While the ACCC has suggested the repeal of Part X, Australia’s major shippers are clear in their view that Part X protections (minimum service levels and minimum notification periods, in particular) are critical to the functioning of our trading economy.

Any replacement mechanism must ensure registration of all agreements and that as part of ACCC’s exemption arrangements, that APSA should retain a designated peak body status to monitor agreements and include 30 days’ notice periods referred to above.

INFRASTRUCTURE CHARGES AND TERMINAL HANDLING CHARGES (THCS)

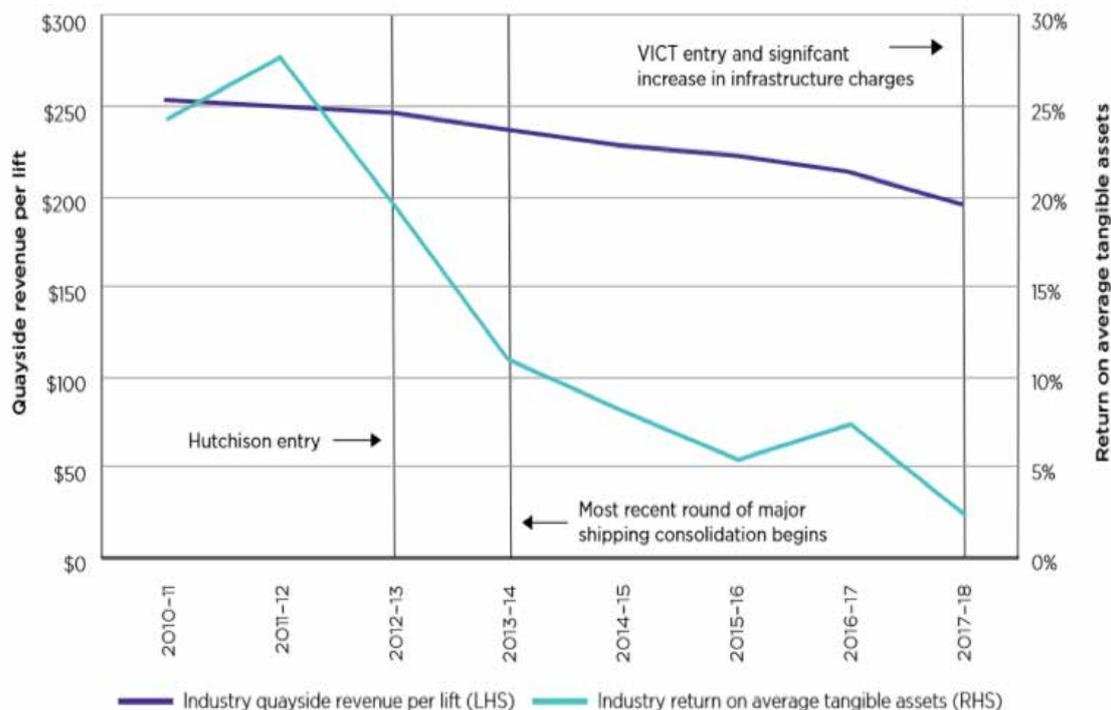
The addition of a third stevedore in Sydney, Melbourne and Brisbane in recent years has added competition at a time when the number of stevedore clients, international shipping lines, has significantly reduced due to consolidation. The combination of increased competition with a greatly reduced client base has caused a restructure in terminal pricing.

APSA understands that competition has resulted in stevedores reducing the prices they charge shipping lines to attract and retain business. That lost revenue appears to have been recovered via landside charges, commonly referred to as “Infrastructure Surcharges”, an unregulated charge for access to international container terminals.

The result has been devastating for Australian exporters, who have, in some cases experienced price increases of over 2,000%, in only a few short years.

As outlined in a 2019 Senate Committee submission prepared by FTA / APSA⁶, during 2018 a major Australian exporter of flour, starch, gluten and stockfeed, shipping 22,140 containers paid \$833,571 in extra costs; similarly an exporter of paper and recyclables, shipping 42,122 containers in 2018, paid \$1,585,893.30 in extra costs.

These fees have exponentially increased since this time. While not suggesting that there is any collusion amongst stevedores, it is clearly a case of ‘follow the leader’ with each stevedore taking turns to ratchet up the fee.



Credit: ACCC Container Stevedoring Monitoring Report 2017-2018

⁵ Australasian Transport Research Forum – Conference September 2019

⁶ Submission to the Senate Committee on Rural and Regional Affairs and Transport on behalf of Freight & Trade Alliance (FTA) and the Australian Peak Shippers Association (APSA) - Inquiry into the Policy, Regulatory, Taxation, Administrative and Funding Priorities for Australian Shipping - 8 March 2019

A current table of costs are listed below:

STEVEDORE	PORT	EXPORT	IMPORT	DATE LAST INCREASED
Flinders Adelaide Container Terminal	Adelaide	\$28.50	\$28.50	1-Jul-18
Australian Amalgamated Terminals (AAT)	Brisbane	\$38.70	\$38.70	8-Nov-18
DP World Australia	Brisbane	\$89.00	\$89.00	1-Jan-20
Hutchison Ports	Brisbane	\$50.00	\$50.00	19-Aug-19
Patrick	Brisbane	\$82.50	\$110.00	9-Mar-20
DP World Australia	Fremantle	\$45.00	\$45.00	1-Jan-20
Patrick	Fremantle	\$25.00	\$50.00	9-Mar-20
DP World Australia	Melbourne	\$98.00	\$98.00	1-Jan-20
Patrick	Melbourne	\$82.50	\$125.80	9-Mar-20
Victoria International Container Terminal (VICT)	Melbourne	\$121.80	\$121.80	1-Mar-20
DP World Australia	Sydney	\$91.00	\$91.00	1-Jan-20
Hutchison Ports	Sydney	\$63.11	\$63.11	18-Nov-19
Patrick	Sydney	\$82.50	\$114.50	9-Mar-20

The below are extracts of correspondence received by APSA from members in late 2019 highlighting the impacts on Australian commerce as a direct result of these charges:

Roger Fletcher (Fletcher International Exports – FIE) – 8 November 2019

Typically, FIE moves in excess of 23,000 full containers through Port Botany, Sydney annually. With the current outlook, Port Botany's average Infrastructure Levy from January 2020 will be over \$77.20 per laden box, without any further rises by Patrick factored in. This equates to \$3.15/mt of grain packed by FIE in a container, putting FIE at a significant disadvantage to bulk vessels, forcing the business to consider bulk alternatives. This reduction in margin is inevitably passed back down the supply chain to the farmer through lower paddock prices for their grain. For FIE's NSW business alone the infrastructure levy equates to a whopping \$1,775,600 paid annually, ultimately creating the equivalent void back within regional farming communities.

Paul Goodman-Jones (Shipping manager – Wilmar Gavilon) – 3 December 2019

From a trading perspective the Australian Agricultural sector are now faced with higher landside supply chain costs further diminishing our international competitiveness on top of a crippling drought. Historical markets in the Asia / PNG / Pacific Rim now have capability of sourcing agricultural products from competing Black Sea and North America regions. With blue water supply chains from these origin countries now established, these markets, historically sourced from Australia agriculture could be lost permanently to Australian producers. The only way our Australian sector can regain these markets once we return to an exportable harvest is to then buy our way back into the market at the expense of the producer. These infrastructure charges are harmful to the Australian Agriculture sector.

Mathew Kelly (CEO KM & WM Kelly & Sons) – 8 December 2019

The recent harvest(s) has been lower than expected due to drought, however in 2017 we packed 5,500 containers through our Tocumwal facility and other packing houses through-out Victoria. With the current Terminal Infrastructure Fee at DP World of \$83.50 per container, the impact is \$459,250/mt being moved from regional communities. With our potential to increase our container out-put to 15,000 annually the flow on effects are stifling further investment with the entire container supply chain market.

Mark Lewis (General Manager – Riordan Grain Services – RGS) – 13 December 2019

Net result across 8,000 TEU's and assuming worst case increase in pricing from \$3.50 per TEU to \$98.00 per TEU has = \$756,000 per annum in additional cost to RGS. This cost must be passed back to the price that RGS pays for grain as we operate in a very competitive local and global market. Many other international origins are now heavily competing for market access to traditional Australian customers and



destinations.

We see the net result of these cost increases having the following impacts:

1. RGS pays less for grain to growers and local regional communities.
2. RGS opts out of investment opportunities in expanding container packing capacity.
3. RGS looks at alternate supply chains for grain export movements eg loading on bulk vessels.
4. The Australian Grain industry loses export competitiveness for Australian grain.

Jack King (Commercial & Procurement Manager – Malteurop Australia) – 27 December 2019

Since our Geelong Malthouse was established in 1998 we have been a significant end user of Malt Barley for the Victorian grain producers. Recently we have expanded our Malthouse capacity to more than double its previous output so we now export approximately 8000 TEU's from our Geelong plant via the Melbourne Port(s) per annum. When these surcharges are applied across that number of containers it becomes a significant cost to doing business into the ever competitive Asian Malt markets. That is not something we can sustain going forward and it flows back down the chain to growers - if we cannot sell our Malt then we simply buy less Barley from the growers.

Revenues generated by stevedore-imposed Infrastructure Surcharges rose by 63 per cent in 2018-19 on the previous year. These revenues helped to offset an 8.1 per cent decline in average quayside revenue because of competition between stevedores and increasing bargaining power of the shipping lines.⁷

To make matters worse, while the international shipping lines are receiving more competitive quayside rates, they are not generally passing on those savings to their shippers. In fact, in many cases, shipping lines have increased the Terminal Handling Charges that they are charging shippers, at a time when Australian shippers are now also paying the stevedores for the same in-terminal services via landside Infrastructure Surcharges.

Part X provides no protections to shippers in this instance, understandably, as this unregulated pricing regime was not envisaged at the time the legislation was enacted.

It is unsustainable for shippers to be paying twice for the same services. It is without international parallel and requires the urgent intervention of Australia's regulators.

⁷ Australasian Transport Research Forum – Conference September 2019

RESPONSE TO DISCUSSION PAPER QUESTIONS

The Australian Peak Shippers Association (APSA) sees merit in

- the ACCC overseeing shipping competition reform, recognising its track record of strong compliance enforcement, noting last year's criminal cartel prosecution against Japanese shipping line Kawasaki Kisen Kaisha Ltd (K-Line) for price fixing in relation to an unregistered agreement, resulting in an order by the Federal Court to pay a fine of \$34.5 million;⁸
- any mechanism replacing Part X, to retain essential features of ensuring retention of minimum service levels and the opportunity for shippers to collective bargain with shipping lines; and
- a block exemption regime, as deployed in New Zealand, providing alignment of covering provisions of agreements between international carriers relating to technical, operational and commercial activities for the joint supply of liner shipping technical services whilst preventing coordination of commercial aspects, particularly pricing.

Additionally, APSA is of the view that any exemption regime is only as effective as the regulation of it. APSA also believes that effective regulation can only be achieved through high levels of mandatory reporting.

These issues are discussed further below in responses to the four (4) questions raised in the ACCC document titled *Proposed Class Exemption for Ocean Liner Shipping* (discussion paper) published on 3 December 2019:

1. WHAT FORMS OF COORDINATION BETWEEN LINERS SHOULD THE CLASS EXEMPTION PERMIT?

ACCC REQUEST FOR INFORMATION - Types of conduct a Liner shipping class exemption might permit

The discussion paper suggests that compliance costs to international carriers may be reduced by introducing a targeted block exemption specific to international liner shipping relating to activities that are unlikely to substantially lessen competition. In this way, the parties would have certainty that their procompetitive activities are immune from legal risk without having to make an assessment on a case-by-case basis. However, specifying which international liner shipping activities should be exempt and any conditions that may be imposed on those activities is a complex exercise.

APSA sees merit in the Harper Inquiry recommendation to repeal the existing Part X regime and grant a block exemption for liner shipping agreements that meet a minimum standard of procompetitive features. It was recommended that agreements that did not meet this standard should be subject to individual authorisation.

Operational matters

Shipping line interests claim that collaborative agreements are necessary to guarantee levels of service to and from Australia at reasonable cost. There are various overseas studies looking at what types of collaboration between shipping lines is desirable to provide efficient liner services that would benefit shippers. Most jurisdictions allow shipping lines to collaborate on operational matters to achieve efficiencies in supplying jointly organised services. Combining resources in this way enables the shipping lines to achieve economies of scale and provide lower-cost services, enhanced frequencies and a wide variety of destinations.

This international experience indicates that at its core, a block exemption regime should focus on jointly organised services, such as vessel sharing, where cooperation results in better services than those that could be provided by each of the carriers if they operated independently. However, other discussions between carriers relating to non-binding rates and surcharges should be subject to the generic tests of competition law requiring that these activities do not substantially lessen competition

Pricing and commercial matters

The potential threat for shippers is the exchange of price and capacity information allowing the opportunity for uncompetitive behaviour.

⁸ ACCC Media Release 2 August 2019 - K-Line convicted of criminal cartel conduct and fined \$34.5 million



From the point of view of Australian shippers, there is a risk that prices charged by shipping lines are above those that would be expected in a competitive market; the frequency and reliability of the service is less than what would be expected in a competitive market; some marginal products may not be exported or imported due to the cost of transport being above the competitive cost; and goods sold in international markets are not as competitive as they could be, this is especially problematic where inputs into the production process are also imported.

APSA does not support a class exemption to include co-ordination on such commercial aspects.

Whatever the exemption, it needs to be properly regulated

Allowing anti-competitive practices is inherently dangerous. Without effective monitoring and regulation, shipping lines can effectively be exempt from competition law without a corresponding benefit to shippers.

International shipping activities are significantly removed from Australian competition law by operating a weak sector-specific Part X regime. This exposes Australian shippers to the risk that agreements between carriers have anti-competitive outcomes that are not sufficiently offset by benefits in shipping supply.

If the risk eventuates, the cost is borne by our shippers in the form of higher freight rates, reduced frequency and reliability of services, and less efficient vessels and operating practices. These outcomes reduce Australia's international competitiveness with flow-on effects through the rest of the economy.

*"The difficulty in assessing the validity of the pro- or anti-exemption position has always been the availability (or lack thereof) of the detailed information necessary regarding actual negotiated freight rates, terms and provisions of service contracts, relationships between operating costs and freight rates and the nature of arrangements among carriers. In an ideal world, a regulatory agency would be able to proceed in a logical fashion to investigate the benefits/disadvantages of anti-trust arrangements. This would entail making an assessment as to these practices, impacts on competition, the net balance of benefits and dis-benefits flowing from these measures and an investigation of alternative approaches to achieving the benefits resulting from these actions."*⁹

These observations were consistent with those of the Australian Productivity Commission in its review of the regulatory regime governing competition in international liner shipping. The Australian Productivity Commission noted that attempts to establish agreements enable carriers to exploit market power and earn above normal rates have been hampered by a lack of available data.¹⁰

RECOMMENDATION 1 – APSA recommends repeal of Part X with a block exemption regime administered by the ACCC that allow shipping lines to collaborate on operational matters only to achieve efficiencies in supplying jointly organised services.

Comment: It is essential that Part X is not be repealed without first achieving equivalent and strengthened protections for Australian shippers in respect to minimum service levels and minimum notification periods - shipping lines should be subject to generic competition laws and upon application to the ACCC, be permitted to combine resources with demonstration of economies of scale, provision of lower-cost services, enhanced frequencies breadth of destinations.

APSA notes that New Zealand generic competition rules to liner shipping. Shipping therefore is treated like the rest of the New Zealand economy with competition rules discouraging cartel activity (conferences/VDA's and price fixing) allowing the possibility for block exemptions (collaborative activity exemption) on a case by case basis. The importance of the generic approach is that any shipping exemptions must meet the generic rules for exemption. This is different to the EU which currently applies a wider and more generous shipping sector specific exemption.

RECOMMENDATION 2 – APSA recommends alignment with the block exemption arrangements established in New Zealand to form a regional approach to shipping line competition law.

Comment: learnings need to be assessed from deficiencies of elements of European Union (EU) block exemption regime.

⁹ OECD, Competition Policy in Liner Shipping, April 2002, p11.

¹⁰ Australian Productivity Commission, Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping, February 2005, p83

RECOMMENDATION 3 - APSA recommends that the block exemption regime retains minimum levels of service (MLS), negotiable shipping arrangements and minimum notification periods as currently provided by Part X.

Comment: An important element of Part X is that it provides minimum service levels and reducing the frequency and instances of “blank sailings”.

AACCC REQUEST FOR INFORMATION - Considering the impact on competition and/or the public benefit, should Liners covered by the class exemption be permitted to:

ACC REQUEST FOR INFORMATION - a) coordinate and/or jointly fix sailing timetables and the determination of port calls in Australia;

YES

This is one of several benefits of co-ordinated services to shippers but can also be a cover for the exchange of other, more sensitive, information. The issue is what information is necessary to allow schedules and port calls to be agreed. This should be defined, and the exemption limited to the exchange of these specific data items.

ACC REQUEST FOR INFORMATION - b) exchange, sell, hire, or lease (or sublease) spaces (slots) on vessels;

YES

The ability for shippers to benefit from this cross-selling activity is the key issue here. In addition to contracted sales to shippers, slots are marketed through forwarders, by slot charterers, and by NVOCCs.

ACC REQUEST FOR INFORMATION - c) pool their vessels to operate a network;

YES

This is the operational effect of Point a. above, but ‘pooling’ should not involve common ownership or control by a holding entity nor the pooling and sharing of costs. This would effectively re-create a liner conference system which would then hold a monopoly of ships operating in that consortia.

ACC REQUEST FOR INFORMATION - d) adjust capacity in response to fluctuations in supply and demand for international liner shipping services;

YES

As a general principle, APSA agrees with these adjustments. However, it needs to be carefully monitored to ensure that adjustments are in response to changes in demand and supply and not used to artificially lessen supply to increase prices.

Further, it is crucial that any adjustments should therefore be subject to a minimum service levels and notice periods.

Exercise of this power under the EU Consortia Block Exemption Regulation (CBER) has resulted in the poor levels of service quality reported by shippers. Capacity adjustments normally manifest themselves as service cancellations, known as ‘blank sailings’, and these seem to be advised at notice periods too short for shippers to adjust their inventory management plans.



ACCC REQUEST FOR INFORMATION - e) fix or coordinate freight prices,

NO - this is strongly opposed

The sharing of price information between consortia members turns the vessel sharing agreement into a full-blown cartel, with the potential of co-ordinated raising of prices and steep barriers to entry for new carriers. This leaves shippers with no choice of provider.

APSA also recommends that controls are implemented to prevent 'price signalling', for example, the advance notice of an intention to increase base contract rates (GRIs).

ACCC REQUEST FOR INFORMATION - f) fix or coordinate surcharges,

NO - this is strongly opposed

The industry is characterised by the widespread use of surcharges, such as for bunker fuel, terminal handling and peak season. Surcharges can be a means of passing on unavoidable costs associated with container shipments to shippers. However, they can also enable carriers collectively to impose price increases on the market – refer to ATTACHMENT A.

For the same reasons as outlined above in item e., this too is opposed.

APSA is of the view that the levying of particular surcharges in the container shipping industry is a market aberration that should not be legitimised. A surcharge should be an exceptional cost applied by mutual agreement between the contracting parties. Given the proliferation of carrier surcharges, any co-ordination would amount to price-fixing by another means and should be resisted on that basis.

Furthermore, APSA sees merit in following the international benchmark established by the Democratic Socialist Republic of Sri Lanka and People's Republic of Bangladesh that has banned container shipping lines from administering prescribed surcharges, minimising the myriad of charges previously implemented without explanation or justification.

ACCC REQUEST FOR INFORMATION - g) pool or apportion earnings, losses or traffic,

No

If permitted this would amount to the operation of the consortium as a jointly owned co-operative and would require and permit an unprecedented level of visibility of commercially sensitive data between shipping lines. It is unclear why this level of co-operation would be necessary to operate an effective consortia service.

ACCC REQUEST FOR INFORMATION - h) restrict capacity (slots) offered;

No

Whereas capacity adjustments in item d. refer to the frequency of sailings, this item seems to offer the ability for shipping lines to reduce the container slots offer to the market (even though the same vessels are operating in the consortium) creating an artificial shortage and so potentially driving up rates.

APSA is opposed to this as a matter of principle as it amounts to market manipulation without a mechanism to determine whether such adjustments were genuine responses to market demand or deliberate attempts at rigging the market.

RECOMMENDATION 4 – APSA recommends the block exemption regime to exclude an ability to fix or coordinate freight prices and surcharges; pool or apportion earnings, losses or traffic; or restrict capacity (slots) offered.

Comment: these exclusions would minimise the risk of market manipulation.

ACCC REQUEST FOR INFORMATION - i) allocate markets (e.g. ports, trade routes or regions);

No

Measures are necessary to ensure that monopolies are not generated at ports or trade routes.

ACCC REQUEST FOR INFORMATION - j) share commercially sensitive information;

NO, with exceptions

The term “commercially sensitive information” can have many meanings. APSA does not agree to the sharing of pricing and related matters. However, naturally many of the above activities supported by APSA require the sharing of what would normally be considered commercially sensitive information in any other economic sector. APSA sees this as being a somewhat redundant question.

ACCC REQUEST FOR INFORMATION - k) collectively bargain with suppliers (e.g. stevedores);

No – this is an area requiring urgent reform

Consolidation of shipping lines and increased consortia arrangements have resulted in Australian stevedores being forced to reduce their supplier charges and have compensated by introducing ‘Infrastructure Surcharges’ to recover operating costs.

As outlined in a recent draft summary report commissioned by the Victorian government’s Department of Transport¹¹, it is evident that increases in landside charges such as Infrastructure Surcharges suggest a rebalance of revenues from quayside to landside as stevedores continue to compete for contracts.

The report also noted the market power achieved through Infrastructure Charge regime is higher than otherwise available due to the ‘captive’ of landside operators. In other words, road and rail operators have no ability to influence price or service and are at ransom to stevedores for terminal access. The transport sector in turn commonly add an administrative fee which is passed down the supply chain with inflated rates paid by shippers.

The impacts of these charges, particularly on high volume / low value commodities, is having a devastating impact of exporters already struggling with fire and long-term drought conditions.

APSA has actively advocated with state and federal regulators to ‘wind back’ the arrangement of stevedore surcharges to create a fair commercial arrangement whereby price, service and point of charging is administered direct between commercial contracted parties.

Specifically, APSA continues to advocate that stevedores should either absorb operating costs or be restricted to only charge their contracted client, being the shipping line. In turn, shipping lines to either absorb these stevedore (supplier) costs or pass them on in negotiated freight rates / Terminal Handling Charges with shippers.

The ability of shipping lines to collectively bargain with suppliers, such as stevedores, is likely to put more pressures on stevedores to reduce charges they impose on shipping lines. Based on previous actions by stevedores, the response to increased pricing pressures from shipping lines will be increased Infrastructure Surcharges.

¹¹ DRAFT Port Pricing and Access Review Summary



RECOMMENDATION 5 – APSA recommends the block exemption registration process to mandate incorporation of stevedore supplier fees to be administered direct and solely against shipping lines (negating the practice of stevedore-imposed “Infrastructure Surcharge” administered against the transport sector).

Comment: this provision would reduce the adverse impacts of Infrastructure Surcharges by forcing commercial negotiations of services and price to be negotiated between commercial interests (i.e. stevedore with shipping line / shipping line and shipper).

ACCC REQUEST FOR INFORMATION - I) any other activity.

A point made by the Global Shippers Forum (GSF) in its response to the CBER evaluation is that the container shipping sector has an appalling record on staying within the rules of even the very generous exemptions granted to it in the past. Several successful legal cases were brought against shipping lines in the European Courts in the late 1990s for breach of the liner conference block exemption. In one case a fine of \$300 million was levied on shipping lines which, for a short time, was the EU record for breach of competition rules.

RECOMMENDATION 6 - APSA recommends that the terms of the block exemption arrangements are drawn as narrowly as possible to permit the desired activities to be operationalised, and no more.

Comment: it is essential that shippers are not exposed to the risk of anti-competitive practices.

2. WHAT ELIGIBILITY CONDITIONS (IF ANY) SHOULD LIMIT WHICH LINERS CAN ACCESS THE CLASS EXEMPTION?

ACCC REQUEST FOR INFORMATION - Cooperation between larger market participants is more likely to raise competition concerns than cooperation between smaller participants.

In order to minimise the risk of inadvertently permitting cooperation that substantially lessens competition, a class exemption may limit which Liners, or combinations of Liners, will be eligible to receive the automatic protection it will confer. For the ACCC to be satisfied that the class exemption will not substantially lessen competition we are considering whether there is a need to limit eligibility to Liners with particular characteristics (such as market share).

For example, the European Union and Hong Kong, impose a market share limit of 30% and 40% respectively, whereas New Zealand does not impose any market share limit.

APSA agrees in principle that a class exemption should be limited to participants that hold less than a specified market share. However, experience from other jurisdictions is that specifications are limited by the regulator’s ability to measure market share.

The Consortia Block Exemption Regulation (CBER) market threshold is outlined in broad terms in the regulation. Article 5 (1) prescribes that in order to qualify for the block exemption “*the combined market share of the consortium members in the relevant market (...) shall not exceed 30% calculated by reference to the total volume of goods carried in freight tonnes or 20-foot equivalent units.*” In Article 5 (2) more precision is added: it indicates that, for the purpose of establishing the market share of a consortium member, the total volumes of goods carried by the member in the relevant market shall be taken into account irrespective of whether those volumes are carried within the consortium in question, within another consortium to which the member is a party, or outside a consortium on the member’s own or on third party vessels. The block exemption shall continue to apply if the market share threshold is exceeded “*during any period of two consecutive calendar years by not more than one tenth*”. Moreover, the exemption “*shall continue to apply for*

¹² Container Shipping in Europe Data for the Evaluation of the EU Consortia Block Exemption OECD/ITF 2019

a period of six months following the end of the calendar year during which it was exceeded”.

However, there is currently no way in which EU regulators or stakeholders can determine with certainty if, and which, alliances are still below the threshold.¹²

APSA sees merit in the APEC Transport Working Group consideration that a public register would improve transparency relating to international liner shipping activities. Furthermore, unilateral activities by firms with substantial market power could lead to competition harms and may require a case by case assessment.

The ACCC is rightly concerned about the impact on competition of allowing shipping lines an engaged in anti-competitive practices. These risks are increased by difficulties obtaining information regarding market share, the consolidation of shipping lines and the disparity in bargaining positions of individual shippers and shipping line consortiums.

To address these concerns, APSA sees an ongoing role for a designated peak shippers’ body to support the ACCC review of proposed shipping line consortia and utilisation of block exemption arrangements. The role of a designated body could provide a review (guarantee check on power) and mandate an effective mechanism for consultation.

RECOMMENDATION 7 – APSA recommends the block exemption regime to introduce a registration process supplying core information to the ACCC to ensure compliance with any new statutory provisions.

Comment: A registration process would mandate the supply of key operational data to assess compliance with block exemption requirements.

RECOMMENDATION 8 – APSA recommends maintaining a statutory provision for a designated peak shippers’ body to support the ACCC review application of block exemption arrangements.

Comment: a continued role for APSA (and as required, secondary peak bodies as per Part X) would support the ACCC in assessing registrations in a contemporary operating environment.

ACCC REQUEST FOR INFORMATION - a) Is it appropriate to restrict which Liners are eligible for the class exemption? For example, if the class exemption covers a wider range of conduct that may not always be benign or always impart a public benefit, it may be preferable for only smaller Liners to receive automatic exemption. On the other hand, if the exempt conduct would never raise competition concerns or will always impart a public benefit, it may be desirable for all Liners to be automatically permitted to engage in the conduct. - How would restricting access to the class exemption reduce the impact on competition? - Why would restricting access to the class exemption result in public benefit?

APSA notes that the CBER regulation is limited to shipping lines operating in consortia where each carrier has a market share of not more than 30 per cent. (i.e. where market share is greater the carrier has no exemption and is exposed to the full weight of general competition law). Should this provision be adopted, the base data must be an accurate and reliable source otherwise such provision is futile.

APSA sees merit in alternate arrangements such as services to and from the Pacific Islands where a blanket exemption may deliver benefits.

ACCC REQUEST FOR INFORMATION - b) If it is appropriate to restrict access, should this be achieved by:

i) a market share cap - Is a cap on the combined market share of the coordinating Liners the most appropriate mechanism? - How should market share be calculated? - What level should the market share cap be set at and why?

ii) any alternative approach to defining eligibility?



In line with the above position, APSA notes and sees merit in the APEC Transport Working Group recommendation against using market share thresholds given the difficulties in defining the market and the uncertainty to assess compliance.

3. SHOULD CARGO OWNERS BE ABLE TO COLLECTIVELY BARGAIN WITH LINERS?

ACCC REQUEST FOR INFORMATION – Part X provides a role for the peak organisation representing Australian cargo owners and enables it to negotiate with Liners seeking to register a Part X Agreement.

While the focus of this submission has been on shipping line arrangements, a need remains for cargo owners to collectively bargain. As outlined in recommendation 7 above, APSA sees an ongoing role for a designated peak shippers' body to provide a review (guarantee check on power) and mandate an effective mechanism for consultation to support benefits currently available under Part X.

The Australian International Movers Association (AIMA) is an APSA member and is the peak industry body representing international removal companies operating in Australia.

APSA understands that AIMA is the only existing shipper representative body utilising the Part X exemption to purchase freight from shipping lines. This has been an established practice for almost 30 years with the major beneficiary being the general public (AIMA member's clients) moving personal house-hold effects.

AIMA is of the view that removal of the Part X provisions would have a devastating effect on the costs of shipping of household goods and personal effects overseas and the productive way AIMA members utilise container equipment under the terms of the contracts in place.

APSA understands that the ACCC is in the final stages of developing its first 'class exemption' in relation to collective bargaining by eligible businesses.

RECOMMENDATION 9 – APSA recommends continuation of legal instruments to allow shippers to negotiate collective freight contracts with shipping lines.

Comment: this may be achieved via the new ACCC class exemption allowing collective bargaining by eligible small business.

4. INDUSTRY BACKGROUND

ACCC REQUEST FOR INFORMATION - The ACCC understands that price coordination between Liners operating to and from Australia is less prevalent than it has been previously. However, the ACCC is seeking to understand the extent to which Liners are reliant on conference and discussion agreements. The ACCC also requests that Liners provide a copy of relevant agreement(s) and an explanation as to why these agreements are necessary / in the public interest. We are also interested in the views of Liners, cargo owners and other industry participants on: a) the structure of the relevant markets b) prices, costs and profitability in those markets

This request for information is best placed with shipping lines.

APSA notes the proposal for a general exemption for liner conference systems, which include pricing and capacity management, by a narrower exemption to permit limited co-operation between lines enough to operate vessel sharing agreements and provide pooled service arrangements. This appears to be the same journey that the European Commission took when it ended its block exemption for liner conferences in 2008 and replaced it with the CBER in 2009.

APSA notes the serious concerns of the Global Shippers Forum (GSF) in terms of the recommended extension of the EU block exemption regime and submits this for the reference of the ACCC – refer ATTACHMENT B

5. CONCLUSION

Australian shippers face significant headwinds in 2020 and beyond.

The shipping line market is rapidly consolidating, supply chain costs are increasing, and there are significant concerns regarding the effectiveness of Part X in being able to achieve basic protections.

It is a rapidly evolving industry with a fear that the existing legislation has already been left behind.

Overwhelmingly, State and Federal Governments need to take a more active role in Australia's sea freight supply chain.

APSA commends the ACCC for commencing initial reforms and we look forward to ongoing engagement to support our shippers compete in international markets.

Paul Zalai

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ATTACHMENT A

The below is a non-exhaustive list of commonly administered shipping line surcharges and fees:

- Low Sulphur Fuel Surcharge
- Currency Adjustment Factor (CAF)
- Bunker Adjustment factor (BAF)
- Terminal Handling Charge (THC)
- Port Congestion Charge
- Peak Season Surcharges
- Equipment Handling Charges
- Equipment Repositioning Surcharges
- Container Cleaning Charges
- War Risk Insurance Surcharges
- Temporary Risk Surcharges
- Emergency Surcharges
- Document Fees
- Cheque Handling Fees
- Status Change Fees
- Cancellation Fees
- Late Forwarding Instruction Fee
- Return to Shipper Fee
- Manifest Amendment Fee
- Piracy Surcharge
- Suez Canal, Aden and Panama Canal Surcharges
- Overweight surcharge
- Food Quality Surcharge
- Reefer Surcharge
- Inland Haulage
- Detention Fees
- Demurrage Fees
- Change of Destination Fees



Evaluation of the EU Consortia Block Exemption Regulation (EC 906/2009) Commission Staff Working Document (SWD(2019) 411 Final); 20 November 2019

GSF RESPONSE

**Submitted to the European Commission in response to its Public Consultation
Reference HT 5252**

2 January 2020

Overview

This paper sets out GSF's position on the Commission's proposal to prolong Commission Regulation No 906/2009 (the Consortia Block Exemption Regulation, or CBER). GSF objects to any prolongation of the CBER without additional assurances about its enforcement, and the development of a plan to bring the container shipping sector fully within the normal EU competition rules.

To that end GSF proposes a strategy to achieve a more fair, transparent and reliable assessment of the needs of the container shipping market. The application of this strategy should commence immediately and should be a condition of any extension to the CBER.

The Global Shippers Forum represents the collective views of shippers in over 20 nations around the world. Shippers are the beneficial owners of cargoes carried by sea in containerised units and are the ultimate consumers of the services provided by shipping lines acting in Consortia.

GSF's membership includes shippers in many countries that trade with the EU and are equally affected by the effects of the CBER as their European suppliers or customers. In its Review, the Commission acknowledges carriers' assertions that the CBER is an influential source of guidance to non-EU jurisdictions and facilitates coherent treatment of consortia across jurisdictions. This confirms GSF's position that the CBER is of global significance and warrants input from the representative body of global shippers' interests, as well as European ones.

The Current Review of the CBER

1. GSF objects to the prolongation of the CBER on the grounds advanced in the Commission Staff Working Document Report (SWD(2019) 411 Final); 20 November 2019 (the SWD) and does not believe the case for the continuation of these excessive legal privileges for carriers has been made to the satisfaction of consumers of their services.

2. GSF is disappointed but not surprised by the Commission's stated intention to renew the CBER. The SWD confirms the Commission's apparently long-standing conviction that the CBER is beneficial to the operation of Consortia and implies prolongation of the CBER was an outcome from which it needed to be dissuaded. The Review relied heavily on commercial data supplied by carriers benefiting from the CBER and discounted the necessarily anecdotal evidence supplied by shippers and other consumers. GSF felt shippers needed to overcome a high degree of inertia in countering these views.

3. GSF believes a weakness of the current Review has been to underestimate the psychological impact of the CBER on a market wary and weary of the collective influence of carriers. The CBER provides significant exceptions from the main body of European competition legislation (Article 101 TFEU) and as such should be treated as an exceptional measure to be granted only in cases of exceptional need. The proven abuses the similar exemptions provided to carriers for the operation of liner conferences in the 1980s



and 1990s has sensitised shippers and other customers to the collective market power of shipping lines when they are permitted to co-operate. Given the Commission's own experience in bringing complaints against the shipping conferences in the 1990s and its subsequent revocation of the Conference Block Exemption Regulation (EC No 4086/86) in 2006, GSF is surprised and concerned at the enthusiasm with which the Commission has championed the case for carriers to be granted continued generous exemptions from European competition law without adequate means of monitoring compliance or behaviour.

4. GSF believes the CBER is a disproportionate and excessively liberal concession from normal competition rules for limited ends and contends that its effects could be better achieved by more focussed and transparent measures. For example, by the Commission providing more specific guidance on compliance with the assessment requirements of Article 101, the absence of which is cited by carriers as a key justification of the need for the CBER.

5. Furthermore, GSF notes that the operational activities that the CBER purports to facilitate are mainly exchanges of information between competing carriers necessary to give effect to vessel-sharing agreements (VSAs). Yet these arrangements are widely practised in other modes of transport and seem to operate to the benefit of carriers and consumers without resort to formal exemption from the disciplines and protections of Article 101. The current Review offered little opportunity to discuss alternatives to the CBER to achieve the same outcomes.

6. GSF is frustrated by the binary nature of the outcomes of the current Review available to the Commission. The only outcomes of the Review legally available to the Commission were to renew, or not to renew, the CBER. Given the choice, GSF opposes renewal. But this overlooks the potential benefits available to shippers from the correct operation of vessel sharing agreements, so the opportunity to support a nuanced outcome has been denied. GSF's dissatisfaction with the CBER arises from the real experiences of consumers of Consortia services in the market place and GSF's expectation was that these could contribute to an adaptation of the CBER to the benefit of shippers. But the binary choices before the Commission have denied the opportunity for modification and adaptation of the CBER to address these legitimate concerns.

7. GSF recognises this follows from the constraints contained in the original Regulation and therefore concludes the CBER is not suitable as a legal instrument to regulate anti-competitive behaviour in the container shipper industry. Instead it should be replaced by more flexible measures capable of adaptation over time in response to the global factors significantly influencing the behaviour of shipping lines in Consortia and to the experiences of shippers managing global supply chains that trade with the EU. Hence, GSF's position that the CBER should be 'Revoked and Replaced' as opposed to renewed and adapted.

The Findings of the Staff Working Document

8. GSF takes issue with a number of specific findings presented in the SWD and these are itemised in the Annex to this document.

9. GSF takes particular issue with the criteria selected to evaluate the success of the CBER, which were:

- Its (legal) effectiveness in facilitating consortia agreements in the market place
- Its (economic) 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 European Union.

10. GSF contends that these criteria are biased towards the interests of carriers and the Commission. They assess the workings of the CBER only from the perspective of carriers (as the co-operating entities) and the Commission itself (as the competition regulator). There is no explicit assessment against the experiences and expectations of shippers as consumers of the services provided by Consortia. GSF considers this is a fundamental omission and a reversal of the norms of competition policy, where the tests of fairness and transparency favour the consumer by default. In using the above criteria, the Commission has effectively judged the merits of the CBER on its ability to make life cheaper for carriers and administratively simpler for the Commission. This is an extraordinary and regrettable subordination of consumer interests to the convenience of providers and regulators that GSF insists be corrected in the future.

11. As evidence of this, GSF notes, with incredulity, that the SWD confirms the Commission's position

that two principal benefits of the CBER are that it is effective and efficient in relieving carriers participating in Consortia of the time and costs of performing the assessments of their behaviour required under Article 101 TFEU (the general competition rules of the EU). This is an extraordinary admission, first as it implies the Commission accepts the costs of compliance with Article 101 to be excessive and burdensome; second, that it is prepared to prolong a measure to disapply them on the grounds that this will reduce the costs to co-operating entities; and third, that it appears willing to do so on the evidence of estimated costs from one anonymous beneficiary. GSF does not consider a claim that carriers can make cost savings by avoiding the costs of meeting normal European competition rules to be a credible argument to prolong the CBER. If it were then the Commission must accept the same argument can be applied to other economic sectors who do not benefit from a Block exemption, much to the detriment of overall consumer protection. GSF calls on the Commission to urgently clarify its position on these justifications for the prolongation of the CBER.

The Future of the CBER

12. GSF notes that the proposed period of prolongation of four years would mean the next review of the CBER will fall within the tenure of the current Commission. GSF argues that a more comprehensive assessment of the shipping market in Europe can and should be started immediately and be completed within the next 12 months.

13. Any prolongation just defers the ‘day of reckoning’ for the CBER and provides no long-term certainty for any party. As competition regulator for the EU the Commission needs to decide urgently the context in which the CBER is adopted. Either, there is a fundamental issue with the costs of compliance with Article 101, as claimed by carriers, in which case this should be corrected urgently, so as to benefit wider commerce and industry, or the CBER is an interim measure to address temporary issues in the shipping industry and will be removed once no longer needed. If so, any prolongation must be conditional upon the adoption of a plan to return the container shipping industry to the normal EU competition rules. The current Review offers no such plan and the proposed prolongation merely perpetuates the uncertainty for all parties.

14. GSF believes the current Review to be flawed by overlooking the impact of the fundamental drivers of collaborative behaviour in the container shipping industry. What is needed is a more inclusive understanding of what the container shipping industry is seeking to achieve through the CBER that it believes is unavailable to it under normal competition rules. In the current Review much was made by carriers of the need for legal certainty over their ability to operate in consortia. But the issues confronting carriers are wider than this. In many respects the container shipping industry should be considered to be in a state of crisis, given the persistently poor profit levels and rates of return on investment reported. Yet ordering of new and even greater capacity by carriers persists. The SWD fails to address the fundamental question of why at a time of historically low and apparently declining revenues and trade volumes, do carriers persist in ordering vessels of capacities far in excess of their capability to fill them (at current rates) and ports to handle them (at current turnaround times) and so need to operate in Consortia in the first place.

15. The basis for the evaluation of the CBER should therefore be comprehensively revised. It should encompass those aspects that were omitted from the current Review and be extended to cover the wider developments of the container shipping market and, crucially, better incorporate

16. GSF believes the Commission should adopt the following measures as a condition of any prolongation of the CBER:

a) A Road Map to ‘normalisation’ of the container shipping market, that accepts that the CBER is an exceptional and temporary measure for an industry in need of exceptional but temporary support. The Commission should commit to the restoration of the normal competition rules of the EU to the container shipping market within the period of any prolongation and serve notice on carriers of this outcome, save that the demonstrably beneficial features of consortia (e.g. vessel sharing agreements) could be preserved through more focussed and transparent measures.

b) The establishment of independent and more frequent measures of market performance using indicators and data from respected intermediate agencies (such as OECD-ITF or UNCTAD), or specifically requested data secured from carriers under powers of subpoena in order to establish independently the benefits and impacts claimed for the CBER. A crucial revelation in the SWD is that the Commission is reliant on carriers to self-assess their compliance with the conditions specified in the CBER. As part of this Review the Commission should urgently state how it intends to measure compliance when the data for judging market share are entirely in the ownership and control of the shipping lines claiming the exemption.



c) The institution of more frequent assessment of the experiences and satisfaction of consumers of Consortia services to more reliably inform the Commission of the perceptions and confidence of the parties that Competition law is intended to protect. GSF is intending to conduct such assessments amongst its global membership and is keen to ensure this conducted to a standard and resilience that will satisfy the Commission's for market evidence.

d) An assessment and incorporation of the trends and factors shaping developments in the container shipping market over the period of any prolongation. The current Review considered only the effects of the past five years and discounted trends and factors that are already demonstrably changing the structure and the nature of the container shipping market, in particular the changed outlook for global trade, the orderbook for ultra-large container vessels (ULCVs, ships exceeding 17,000 teu capacity) and continued merger and acquisition activity by larger shipping lines, including the vertical acquisition of freight forwarding companies and inland transport operators. As a condition of any prolongation the Commission should identify changes in market structure that would trigger an automatic review of the CBER, such as a reduction in the number of carriers in a Consortium.

17. GSF recommends these features be captured by the adoption of new consumer-facing evaluation criteria, to balance the current criteria favouring carriers and the regulator. The omission of consumer-facing criteria is a major weakness of the SWD's evaluation and undermines confidence in the fairness of its outcomes. GSF proposes the following four criteria be used to evaluate the impact of the CBER under any prolongation:

- **Enforceability of terms:** the declaration of which data sources will be used to assess the compliance of carriers with the conditions of the CBER and whether these were freely available to the Commission. The SWD admits to a reliance on data provided voluntarily by carriers under the current CBER.
- **Transparency of effects:** the outcomes for consumers the CBER is intended to produce and whether these are actually experienced in the market. This criterion should evaluate consumers' experiences over time to distinguish between carriers' planned or claimed levels of service and those achieved in practice.
- **Confidence of consumers:** a measure of the confidence felt by shippers and other consumers of consortia services that they are experiencing the benefits intended, albeit outside the protection of the normal competition rules.
- **Routes to remedy:** the nature and frequency with which consumers have brought irregularities in the market believed to be a consequence of the CBER to the attention of the Commission, including those arising from changes in market structure, such as merger and acquisition activity. Currently this opportunity is formally restricted to the period when the CBER is under review or to the instigation of a formal Complaint by consumers.

Conclusions

GSF disagrees with the Commission's proposal to simply prolong the CBER. The terms of the Review seem to have limited discussion to either renewal or non-renewal of the current legal instrument. This has precluded the possibility of a wider discussion of the role of competition policy in optimising the benefits of Consortia to shippers and other consumers of their services. The terms of the Review also regrettably precluded any assessment of alternatives to the CBER.

The Review revealed no convincing reason why the container shipping industry alone should be granted the quite exceptional benefits of the CBER. Relief from the costs and time needed to comply with the rightly demanding requirements of Article 101 TFEU is simply not a credible or sustainable justification for exemptions from normal EU Competition policy.

GSF also contests many of the findings of the Staff Working Document and believes they overlook legitimate and significant issues raised by shippers in the course of the Review.

GSF urges the Commission to revisit its decision and recognise that in proposing a simple prolongation of the existing CBER it has missed an important opportunity for help the container shipping industry become more responsive in its role of serving European exporters and importers trading in the global market place.

GSF Secretariat

3 January 2020