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COMMISSION DECISION

of 7.7.2016

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the
European Union and Article 53 of the EEA Agreement**

Case AT.39850 Container Shipping

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission decisions of 21 November 2013 and 13 November 2015 to initiate proceedings in this case,

Having expressed concerns in the preliminary assessment of 26 November 2015,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns²,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

- (1) This Decision concerns a practice whereby the addressees of this decision ("Parties") have been regularly announcing their intended future increases of container liner shipping prices ("Prices") on their websites, via the press, or in other ways. Those announcements are made several times a year and contain only the amount of the intended increase, the date of its planned implementation and the affected trade routes.
- (2) In its preliminary assessment of 26 November 2015 ("Preliminary Assessment"), the Commission expressed the concern that that practice may allow the Parties to

¹ OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

² OJ C 60, 16.2.2016, p.7.

exchange information on their future pricing intentions and thus may have the object of restricting competition on the market for container shipping transport services on routes to and from the European Economic Area ("EEA"), in breach of Article 101 of the Treaty and Article 53 of the EEA Agreement.

1. THE PARTIES

- (3) **CMA CGM S.A.** ("CMA CGM"), based in Marseille, France, is a global container shipping company, whose shares have been mainly family owned since its creation. ANL Singapore Pte Ltd is the local office of ANL Container Line Pty Ltd, a container shipping company that is controlled by CMA CGM.
- (4) **China COSCO Container Lines Co., Ltd.** ("COSCON") is a provider of integrated container shipping services. COSCON is the key company specializing in container transport under COSCO Holdings Company Limited ("COSCO"). In March 2016, COSCON acquired control of China Shipping Container Lines (Shanghai) Co., Ltd, from China Shipping Container Lines Co. Ltd ("CSCL"). The latter stopped providing container liner shipping services.
- (5) **Evergreen Marine Corporation (Taiwan) Ltd.** ("Evergreen") is an international shipping company. Evergreen is affiliated to Evergreen Group which also offers land and air transportation operations.
- (6) **Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG** ("Hamburg Süd") is a globally operating transport logistics organisation based in Germany.
- (7) **Hanjin Shipping Co., Ltd.** ("Hanjin") is based in South Korea and provides container and bulk carrier transportation and operates terminals.
- (8) **Hapag-Lloyd AG** ("Hapag Lloyd") is a global liner shipping group based in Germany. Hapag Lloyd controls Hapag-Lloyd Pte Ltd.
- (9) **Hyundai Merchant Marine Co. Ltd.** ("HMM") is an integrated logistics group offering container, wet bulk and dry bulk shipping services. HMM is based in South Korea. HMM controls Hyundai Merchant Marine (EUROPE) LTD.
- (10) **A.P. Møller – Maersk A/S** ("Maersk") is a Danish business conglomerate, listed on the Copenhagen Stock Exchange. Maersk Group has four core businesses which include Maersk Line, APM Terminals, Maersk Oil, and Maersk Drilling.
- (11) **Mitsui O.S.K. Lines, Ltd.** ("MOL") is an ocean shipping group based in Japan. MOL's fleet ranges from specialized dry bulkers for iron ore, coal, and wood chips to tankers that transport crude oil and LNG, and car carriers and containerships. MOL controls MOL (Europe) B.V. and MOL Liner Limited.
- (12) **MSC Mediterranean Shipping Company S.A.** ("MSC") is an ocean shipping group based in Geneva, Switzerland. Besides container shipping, MSC's subsidiaries also operate ferry services and cruises. MSC is controlled by MSC Mediterranean Shipping Company Holding SA.
- (13) **Nippon Yusen Kabushiki Kaisha** ("NYK") is a Japanese group which provides ocean, land, and air transport services. It provides container shipping services through its subsidiary NYK Container Line Ltd. NYK controls NYK Group Europe Ltd, NYK Line (Hong Kong) Ltd and NYK Line (Thailand) Co, Ltd.
- (14) **Orient Overseas International Ltd.** ("OOIL") is a public company listed on the Hong Kong Stock Exchange. It fully owns the company Orient Overseas Container

Line Ltd. ("OOCL"), one of the world's largest integrated international container transportation, logistics and terminal companies.

- (15) **United Arab Shipping Company (S.A.G.) ("UASC")** is based in the United Arab Emirates and was formed jointly between the Kingdom of Bahrain, the Republic of Iraq, the State of Kuwait, the State of Qatar, the Kingdom of Saudi Arabia, and the United Arab Emirates. It provides container shipping services.
- (16) **ZIM Integrated Shipping Ltd. ("ZIM")**, based in Haifa, Israel, provides container shipping services.

2. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

- (17) Between 17 and 20 May 2011 Commission officials, assisted by their national counterparts, conducted unannounced inspections at the premises of companies active in the container liner shipping sector in several Member States.
- (18) By decisions of 21 November 2013 and 13 November 2015 the Commission initiated proceedings against the Parties. On 26 November 2015 the Commission adopted the Preliminary Assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 which set out the Commission's competition concerns. The Preliminary Assessment was notified to the Parties on 26 November 2015.
- (19) Between 21 December 2015 and 12 February 2016 the Parties submitted commitments to the Commission in response to the Preliminary Assessment ("Commitments").
- (20) On 16 February 2016 a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Commitments and inviting interested third parties to give their observations on the Commitments within one month following publication ("the Article 27(4) Notice").
- (21) On 27 June 2016 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 28 June 2016 the Hearing Officer issued his final report.

3. PRELIMINARY ASSESSMENT

3.1. The services concerned

3.1.1. Container liner shipping services

- (22) The relevant services are deep-sea container liner shipping services. They involve the provision of regular, scheduled services for the carriage of containerised cargo by sea. They can be distinguished from non-liner shipping (tramp, specialized transport) because of the regularity and the frequency of the service. Furthermore, they can be distinguished from non-containerized transport such as bulk vessel.³

³ Judgment in *Atlantic Container Line AB and Others v Commission*, Joined Cases T-191/98, T-212/98 to T-214/98, ECLI:EU:T:2003:245, paragraph 273; See also Case COMP/M.3829 – Maersk/PONL, paragraph 7; Case COMP/M.3973 – CMA CGM / Delmas, paragraph 6; Case COMP/M.5450 – Kühne/HGV/TUI/Hapag Lloyd, paragraph 13.

(23) A possible narrower service market may be that for the transport of refrigerated goods in containers, which could be limited to reefer containers only.⁴ However, since the vast majority of the price increase announcements of the Parties were made for containers of all kinds, there is no need, for the purposes of this Decision, to distinguish between potential submarkets according to the type of containers.

3.1.2. *The geographic dimension of container liner shipping services*

(24) Container liner shipping services are organised by trade routes (for example from Far East Asia to Northern Europe or from the US West Coast to the Mediterranean), which are defined by the range of ports which are served at each end of the service. Each trade route has specific characteristics depending on the volumes shipped, the types of cargo transported, the ports served, and the length of the journey from the point of origin to the point of destination.⁵ Market conditions on the two directions of a trade route can also be different, in particular in the case of trade imbalances or differing characteristics of the products shipped.⁶

3.2. **The practice subject to the proceedings**

3.2.1. *General Rate Increases (GRIs)*

(25) The Commission focused its fact finding in the investigation in this case on the trade routes from Far East Asia to North Europe and the Mediterranean (westbound) which are the EEA's busiest trade routes. However, the Commission is aware that some of the Parties have also been announcing their intended future increases of Prices on other trade routes.

(26) Between 2009 and 2015, the Parties have regularly announced their intended future price increases for deep-sea container liner shipping services, at least on routes from Far East Asia to Northern Europe and the Mediterranean (westbound), on their websites, via the press, or in other ways. Those announcements indicate the amount of the intended increase in US-Dollars per transported container unit (twenty-foot equivalent unit, "TEU"), the affected trade route and the intended date of implementation. Such announcements are widely known in the industry as "General Rate Increase Announcements" or "GRI Announcements". They generally concern sizable rate increases of several hundred US-Dollars per TEU.

(27) GRI announcements are made in "rounds" 3 to 5 weeks before the intended implementation date of the price increase. The rounds typically begin with one Party announcing its intention to increase Prices on a given route by a certain amount, as of a certain date. In the following days and weeks, other Parties announce in turn intended price increases of a similar magnitude, for the same route and with a similar or identical implementation date.⁷ Announced GRIs sometimes were postponed or

⁴ See for example Case COMP/M.3829 – Maersk/PONL, paragraph 7 et seq.; Case COMP/M.3973 – CMA CGM / Delmas, paragraph 6; Case COMP/M.5450 – Kühne/HGV/TUI/Hapag Lloyd, paragraph 13.

⁵ See for example Case COMP/M.3829 – Maersk/PONL, paragraph 14; Case COMP/M.3973 – CMA CGM / Delmas, paragraph 8; Case COMP/M.5450 – Kühne/HGV/TUI/Hapag Lloyd, paragraph 14.

⁶ See for example, M.3829 - Maersk/PONL, paragraph 15. The Commission ultimately left the precise scope of the geographic market definition open.

⁷ Not all Parties participated in all GRI rounds and some Parties have stated that they stopped publishing GRI announcements on their websites and via the press following the initiation of proceedings in this case.

modified by some of the Parties, possibly aligning them with the GRIs announced by other Parties.

- (28) The following example for the trade routes Far East Asia - North Europe and Mediterranean (westbound) illustrates this practice:

Party	Announcement date	Implementation date	The Announced amount of the increase (in USD)
OOCL	26.9.2012	1.11.2012	525
UASC	26.9.2012	1.11.2012	505
CSCL	27.9.2012	1.11.2012	525
ZIM	27.9.2012	1.11.2012	500
Coscon	28.9.2012	1.11.2012	550
Hapag	28.9.2012	1.11.2012	500
MSC	29.9.2012	1.11.2012	500
NYK	1.10.2012	1.11.2012	550
Evergreen	2.10.2012	1.11.2012	525
HMM	2.10.2012	1.11.2012	500
Maersk	2.10.2012	1.11.2012	500
CMA CGM	10.10.2012	1.11.2012	500
Hanjin	12.10.2012	1.11.2012	500
MOL	25.10.2012	1.11.2012	500

- (29) According to the information in the Commission's file, in the years 2009 to 2015 between 7 and 12 GRI rounds took place per year on the trade routes from Far East Asia to North Europe and to the Mediterranean (westbound) on which the Commission focused its investigation. During that time announcements of price decreases were never made, although Prices in that period were generally depressed and frequently falling.

3.3. The Commission's concerns

3.3.1. Article 101(1) of the Treaty and Article 53 of the EEA Agreement

- (30) Article 101(1) of the Treaty prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market unless the conduct meets the conditions for exemption pursuant to Article 101(3) of the Treaty. Article 53 of the EEA Agreement contains an analogous provision.
- (31) In the Preliminary Assessment the Commission raised the concern that the exchange of information about future pricing intentions subject to the proceedings in this case may constitute a concerted practice contrary to Article 101 of the Treaty and Article 53 of the EEA Agreement.

3.3.2. *Concerted Practice*

3.3.2.1. Principles

- (32) The concept of concerted practice under Article 101(1) of the Treaty refers to a form of coordination between undertakings by which, without having reached the stage of an agreement, they knowingly substitute practical cooperation between them for the risks of competition.⁸
- (33) According to the case law of the courts of the European Union, the elaboration of an actual plan is not a prerequisite for considering coordination or cooperation to be prohibited. The criteria of co-ordination and co-operation in the case law must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the internal market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.⁹
- (34) Thus, conduct may fall under Article 101(1) of the Treaty as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour.¹⁰ In order to prove that there has been a concerted practice, it is not necessary to show that an undertaking has formally undertaken – in respect of one or several other competitors – to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market. It is sufficient that through a declaration of intention an undertaking has eliminated, or at least substantially reduced, the uncertainty as to the conduct to be expected from it on the market.¹¹

3.3.2.2. Information exchange as a concerted practice

- (35) According to the case law, information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion - that is to say, if the data exchanged is strategic.¹² Information about competitors' future pricing intentions constitutes the most sensitive commercial information. The exchange of such information removes uncertainties concerning the future conduct of

⁸ See for example judgment in *T-Mobile Netherlands v RvB NMa*, C-8/08, ECLI:EU:C:2009:343, paragraph 33; judgment in *ICI v Commission*, Case 48/69, ECLI:EU:C:1972:70, paragraph 64.

⁹ Judgment in *Degussa v Commission*, T-279/02, ECLI:EU:T:2005:187, paragraph 132; judgment in *Suiker Unie and others v Commission*, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/1973, ECLI:EU:C:1975:174..

¹⁰ See also judgment in *Hercules v Commission*, Case T-7/89, ECLI:EU:T:1991:75, paragraph 255.

¹¹ Judgment in *Degussa v Commission*, T-279/02, ECLI:EU:T:2005:187, paragraph 133; judgment in *Cimenteries CBR and Others v Commission*, Joined Cases T-25/95 etc, ECLI:EU:T:2000:77, paragraph 1849 and 1852.

¹² See Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11.1.2011 ("Horizontal Guidelines"), paragraph 61.

the participating undertakings regarding the level, timing and scope of application of price increases.

- (36) Although in terms of Article 101(1) of the Treaty, the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own commercial conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 101(1) of the Treaty, even in the absence of anti-competitive effects on the market ("restriction by object", see section 3.3.4.).

3.3.3. *The Commission's concerns in this case*

- (37) In the Preliminary Assessment the Commission raised the concern that the Parties' practice may allow them to explore whether other Parties also intend to increase Prices and to coordinate their behaviour. The announcement of price increase intentions can give indications about the other Parties' likely conduct on the market. The Commission raised the preliminary concern that the practice may enable the Parties to "test" whether they can reasonably implement a price increase without incurring the risk of losing customers, thereby reducing strategic uncertainty for the Parties and diminishing incentives to compete.
- (38) The Commission raised the preliminary concern that the GRI announcements may increase the chance that the price increases announced by the Parties are supported by the other Parties, at least temporarily. By "responding" to the GRIs of the other Parties, the Parties may be able to align the level of their increases and the date of implementation and, ultimately, arrive at a common higher price level, without incurring the risk of losing market share or triggering a price war during the period of adjustment to new Prices.
- (39) The Commission raised the preliminary concern that since GRI announcements are made in advance of their implementation date they may allow the Parties to first try to push for a price increase and, should there not be enough "support" from other Parties' GRIs, to cancel or postpone the intended increase without risking losing customers. If a sufficient number of Parties have "responded" to the announced GRI and announced price increases simultaneously, customers may be left with few alternatives and may have to accept the increase.

3.3.3.1. *Low value of GRIs for customers*

- (40) According to the Parties, GRIs are an efficient way of reaching customers (in particular potential new customers) in order to inform them of price changes. However, in the Preliminary Assessment the Commission raised the concern that GRI announcements are of little value for customers, for the reasons set out below.
- (41) First, the Commission raised the preliminary concern that GRI announcements may not inform new or potential customers about the Parties' Prices, since they only provide information regarding an intended price increase and the intended amount of the increase. Consequently, the total freight price may remain unknown and GRIs may not allow customers to compare Prices.
- (42) Second, contrary to the arguments made by some Parties, GRI announcements are unlikely to be a suitable "promotion" means to attract new customers since they only relate to price increases, not decreases, which are more apt to attract customers.

- (43) Third, the Commission raised the preliminary concern that GRI announcements have no committal value but are mere intentions of future pricing behaviour, upon which customers may not be able to rely. The time period between the announcement of GRIs and their actual implementation allows Parties to revise the GRIs. The Commission raised the preliminary concern that whether the announced price increases are implemented or not may depend on the reactions of the other Parties, and that Parties may even occasionally issue new GRI announcements increasing their initial announcements.
- (44) The Commission took the preliminary view that GRI announcements may have little value to customers since they may not enable them to plan ahead or compare Prices between Parties.

3.3.3.2. The exchange of information in this case as a concerted practice

- (45) Unilateral announcements that are genuinely public generally do not constitute a concerted practice. However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded in a situation where such an announcement is followed by public announcements by competitors.¹³
- (46) In the Preliminary Assessment the Commission raised the preliminary concern that the Parties' practice may amount to a strategy for reaching a common understanding about the terms of coordination.¹⁴ In particular, the similar GRI announcements of the Parties within a GRI round may be regarded as strategic responses of competitors to each other's public announcements.
- (47) The Commission came to the provisional conclusion that every Party was in a position to take account of the information published in the GRI announcements of the other Parties when determining its own conduct on the market and therefore took part in the concerted practice by making GRI announcements itself.

3.3.4. *Restriction of competition by object*

- (48) Certain types of coordination between undertakings reveal a sufficient degree of harm to competition that they may be considered a restriction of competition by object and that there is no need to examine their effects. To determine whether this is the case, regard must be had inter alia to:
- (a) its content,
 - (b) the objectives it seeks to attain, and
 - (c) the economic and legal context of which it forms part.¹⁵

3.3.4.1. The content and nature of the information exchanged

- (49) As regards the content and nature of the information exchanged, the Commission raised the preliminary concern that the GRIs are announcements of future pricing intentions as opposed to unilateral public announcements of actual and current Prices. The Commission expressed the preliminary concern that the exchange of

¹³ Horizontal Guidelines, paragraph 63.

¹⁴ Horizontal Guidelines, paragraph 63.

¹⁵ Judgment in *Dole v European Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 117; judgment in *Groupement des cartes bancaires v Commission*, C-67/13, ECLI:EU:T:2015:636, paragraph 53.

information on such intentions concerning future conduct may reduce or eliminate, for each Party, the uncertainty as to the other Parties' future pricing behaviour, allowing them to coordinate their conduct in the market. The Commission raised the preliminary concern that this could allow all competitors to achieve higher Prices.

- (50) The information disseminated by way of GRI announcements in this case includes the amount of the intended price increase, the intended implementation date and the geographic area concerned. In line with the case law of the Court of Justice, "*an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object*".¹⁶
- (51) Also according to the case law, exchanging information on companies' individualised intentions concerning future conduct regarding Prices is particularly likely to lead to a collusive outcome and will be considered a restriction of competition by object.¹⁷

3.3.4.2. The objective of the information exchange

- (52) As noted in Section 13.3.3.1 above, the Commission raised provisional concerns that GRI announcements may be of limited value for customers and may be of value for coordinating pricing behaviour among the Parties. In the Preliminary Assessment the Commission raised the concern that the practice subject to the proceedings may have had the objective of communicating pricing intentions to competitors rather than informing customers about price developments.

3.3.4.3. The economic and legal context of the information exchange

- (53) The economic and legal context in which the practice takes place also has to be taken into account. From 2009 onwards, a large number of GRI rounds took place. The Commission was concerned that the regular practice may have allowed the Parties to develop a climate of mutual certainty as regards their respective future pricing policies.
- (54) Furthermore, regarding the economic context, the Commission was concerned that GRI announcements were made independently of whether Prices were at highs or lows. The Commission was concerned that GRI announcements may have had limited connection to real market conditions.
- (55) In the Preliminary Assessment the Commission therefore raised the concern that the practice subject to the proceedings may amount to a restriction of competition by object.

3.3.5. *Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement*

- (56) An agreement or concerted practice can be exempted from the prohibition of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement pursuant to Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement where it satisfies the following four cumulative criteria:

¹⁶ Judgment in *Dole v European Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 122.

¹⁷ See references in the Horizontal Guidelines, paragraphs 73 and 74.

- (a) it contributes to improving the production or distribution of goods or (by analogy) services or to promoting technical or economic progress ("efficiencies");
 - (b) it allows consumers a fair share of the resulting benefit;
 - (c) it does not impose restrictions that are not indispensable to the attainment of those objectives; and
 - (d) it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- (57) Genuine public pricing announcements can help customers to make a more informed choice and reduce customers' search costs. However, efficiencies are less likely to result from the publication of future pricing intentions (such as the GRI announcements) because companies which announce their pricing intentions may revise them before consumers actually purchase based on that information. Consumers generally cannot rely on companies' future intentions.¹⁸
- (58) As set out in section 3.3.3.1, above, the Commission raised the preliminary concern that GRI announcements have limited value for customers. The Commission preliminarily considered that the practice subject to the proceedings is unlikely to produce efficiencies and therefore may not fulfil the conditions of Article 101(3) of the Treaty.

3.3.6. *Effect on trade between Member States and EEA Contracting Parties*

- (59) It is established case law that intra-Union trade may be appreciably affected by a restriction of competition between international liner shipping companies.¹⁹ The practice of GRI announcements affects the whole territory of the EEA. All countries in the EEA receive goods from overseas or send goods overseas through deep-sea container liner shipping services, either directly through seaports or indirectly via other means of transportation linking those countries without access to the sea with the major sea ports.

4. JURISDICTION

- (60) The competition rules of the Union apply irrespective of where the undertakings are located or where the agreement/concerted practice has been concluded, provided that it is implemented, or it is foreseeable that it produces immediate and substantial effects, inside the Union.²⁰
- (61) In this case, the Commission reached the preliminary view that the conduct of the parties was implemented in the EEA, as the Parties published GRIs for routes from and to the EEA and sold the services concerned by the practice in the EEA, and it was foreseeable that it produced immediate and substantial effects inside the EEA

¹⁸ Horizontal Guidelines, paragraph 99.

¹⁹ See for example: judgment in *Compagnie maritime belge and others v Commission*, Joined Cases T-24-26, 28/93, ECLI:EU:T:1996:139, paragraphs 202 and 203; judgment in *Atlantic Container Line v Commission*, T-395/94, ECLI:EU:T:2002:49, paragraphs 72, 73 and 74; Case COMP/37.396/D2 Revised TACA, paragraphs 73, 74 and 75.

²⁰ See judgment in *Gencor Ltd v. Commission*, T-102/96, EU:T:1999:65, paragraph 90 and in *Intel Corp. v Commission*, T-289/08, ECLI:EU:T:2014:547, paragraphs 243 and 244.

(for example, affected the rates paid by customers in the EEA for container shipping services).

5. PROPOSED COMMITMENTS

(62) The parties do not agree that they have engaged in the practice subject to the proceedings nor do they agree with the legal analysis in the Preliminary Assessment. The parties have nevertheless offered Commitments pursuant to Article 9 of Regulation (EC) No 1/2003 to meet the Commission's competition concerns. The parties have submitted that this should not be interpreted as an acknowledgement that they have infringed the Union competition rules, or as an admission of liability.

5.1. The main elements of the Commitments proposed by the parties

(63) The Parties offer to stop publishing and communicating GRI announcements, that is to say, changes to Prices expressed solely as the amount or percentage of the change.

(64) The Parties will not be obliged to publish or communicate (hereinafter referred to as "announce") their Prices, but should they choose to do so, their price announcements will contain at least the following information:

- (a) the amount of the base rate, bunker charges ("BAF"), security charges, terminal handling charges ("THC") and peak season charges ("PSS", or similar charges);
- (b) which other charges may apply;
- (c) the services to which they apply;
- (d) the period to which they relate (which can be either expressed as a fixed period or open ended, in which case Prices are valid until further notice).

Announcements will not be made more than 31 days before the day on which they are implemented.

(65) The Parties will be bound by their price announcements during their validity period as maximum Prices, but will be free to offer lower Prices.

(66) In order to facilitate the conduct of business, the Parties include two exceptions to the Commitments in situations that would be unlikely to give rise to the Commission's competition concerns. The Commitments will not apply to:

- (a) communications with purchasers who on that date have a rate agreement in force on the route to which the communication refers;
- (b) communications during bilateral negotiations or communications tailored to the needs of identified purchasers.

The Parties will, however, remain bound by the maximum Prices set out in relevant price announcements that are applicable to the same services and customers referred to in the communications, under the conditions set out in the Commitments.

(67) The Commitments will enter into force 5 months after the adoption of this Decision and apply for 3 years to all routes to and from the EEA.

(68) The Commitments will not prevent the Parties from complying with requirements based on laws or regulations of other jurisdictions. The Parties will inform the Commission in cases of conflicts with the Commitments.

6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003

- (69) In response to the publication on 16 February 2016 of the Article 27(4) Notice, the Commission received 4 responses from interested third parties.
- (70) A response received from a shipper stated that the Commitments offered by the Parties would not solve the underlying problem which in his view is the existence of an agreement between the Parties on price changes. The Commission, however, did not find evidence of such an agreement between the Parties.
- (71) A response received from a shippers' association stated that the main shipping companies do not publish their Prices. The association submitted that the main commitment needed is not to issue GRI announcements and the other Commitments are only needed if the Parties choose to make a price announcement. This view is consistent with the Commitments proposed by the Parties.
- (72) A response received from an association of logistic companies stated that the Commitments may offer a good basis for transparency and fair competition. Providing customers with clearer and more reliable information on rate increases may help to enhance competition between the shipping lines by allowing customers to compare price offers in depth.
- (73) A response received from a shippers' association stated that the price announcements made according to the Commitments would, indeed, be more useful to customers providing them with fuller information and increased committal value. However, it raised the concern that price announcements may still allow the Parties to coordinate their behaviour. In that respect it noted that there is already a high degree of cooperation in the market through the "mega alliances" and that currently published Prices in the industry are far higher than actual Prices. The Commission acknowledges that more transparency in price announcements would, by its nature, mean more transparency for both the carriers and customers. For the reasons stated in recital (84) the Commission considers it unlikely that Prices announced in accordance with the Commitments would serve as a tool for collusion. In addition, the Commission notes that the large majority of Parties do not publish their full Prices and it is far from obvious that they would start doing so in order to coordinate Prices.
- (74) Overall the observations received did not allow the Commission to identify new competition concerns and contained no points such as to make the Commission reconsider the concerns it expressed in the Preliminary Assessment or the appropriateness of the Commitments as discussed in Section 7. In view of the results of the market test, the Commission maintains the position that it took in the Article 27(4) Notice, namely that the Commitments are adequate to meet the competition concerns expressed in the Preliminary Assessment.

7. PROPORTIONALITY OF THE COMMITMENTS

7.1. Principles

- (75) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.²¹
- (76) In the context of Article 9 of Regulation (EC) No 1/2003, application of the principle of proportionality entails, first, that the commitments in question address the concerns expressed by the Commission in its Preliminary Assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately.²² When carrying out that assessment, the Commission must take into consideration the interests of third parties.²³

7.2. Application in this case

- (77) The Parties have committed to bring the practice subject to the proceedings to an end and not to make announcements of Price increases indicating only the amount of the intended increase.
- (78) The Parties reserve the right to decide whether to make price announcements. When announcing their Prices the Parties will provide customers with a sufficient level of detail for them to make informed decisions. The announced Price will refer to the 5 main elements of the price representing about 90% of its full amount thus giving customers a good basis to compare Prices. The remaining elements of the price are mostly contingency and local administrative charges. Contingency charges depend on the occurrence of events which cannot be anticipated in advance and therefore cannot be announced. Local administrative charges are usually small and set locally, and because of their large number it is difficult for the Parties to follow them centrally. The Parties will, however, inform customers that such other charges may apply.
- (79) The announcements will state the period and services to which they relate. The announced Prices will be binding on the Parties as maximum Prices, thus allowing customers to rely on them. The Parties remain free to set their Prices, as well as the period and terms of service to which the Prices relate. The Commitments therefore do not interfere with the commercial discretion of the Parties but only with the form in which their Prices are announced, should the Parties choose to announce them.
- (80) Prices will be announced at a time when significant numbers of customers book container liner shipping services (not more than 31 days in advance). Earlier announcements may give competitors insight into each other's future Prices while not being useful for customers since they are not booking yet, thus possibly leading to a collusive outcome.
- (81) The exceptions to the Commitments facilitate the conduct of business without raising concerns of collusion between the Parties because they are limited to communications with specific customers.

²¹ See for example, judgment in *Air Inter v. Commission*, T-260/94, ECLI:EU:T:1997:89, paragraph 144 and *Van den Bergh Foods v. Commission*, T-65/98, ECLI:EU:T:2003:281, paragraph 201.

²² Judgment in *Commission v Alrosa*, C-441/07 P, ECLI:EU:C:2009:555, paragraph 41.

²³ Judgment in *Commission v Alrosa*, C-441/07 P, ECLI:EU:C:2009:555, paragraph 41.

- (82) The Commitments represent a significant shift in the Parties' practice of announcing their Prices. It is therefore appropriate to allow for a short period of 5 month for re-organisation of the Parties' business and for a 3 year application period of the Commitments. Although the Commission's fact finding in this investigation was focused on the trade routes Asia – North Europe and Mediterranean, the same principles of conduct should apply to all trade routes affecting the EEA.
- (83) The Parties' international businesses cross a large number of countries and jurisdictions. Although the Commission is not aware of any conflict between existing regulation and the Commitments, conflicts in the future cannot be excluded. It is therefore appropriate to clarify that subject to a commitment to inform the Commission of such conflicts, the Commitments will not prevent the Parties from complying with requirements set by other jurisdictions.
- (84) Timely, transparent and committal price announcements would allow customers to take informed purchasing decisions and make it very difficult for Carriers to collude on Prices. Although more transparent price announcements would by nature mean more transparency for both the Parties and customers, customers would be able to make informed purchase decisions, making collusion difficult and risky.
- (85) The Commitments are therefore sufficient to address the concerns identified by the Commission in its Preliminary Assessment. The Parties have not offered less onerous Commitments in response to the Preliminary Assessment that also address the Commission's concerns adequately.
- (86) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the Article 27(4) Notice.
- (87) This Decision accordingly complies with the principle of proportionality.

8. CONCLUSION

- (88) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the Preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its Preliminary Assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of the Article 27(4) Notice.
- (89) In the light of the Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.
- (90) The Commission retains full discretion to investigate and open proceedings under Article 101 of the Treaty and Article 53 of the EEA Agreement as regards practices that are not the subject matter of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The Commitments as listed in the Annex shall be binding from 7 December 2016 until 7 December 2019 on the addressees mentioned in Article 3.

Article 2

It is hereby concluded that there are no longer grounds for action in this case.

Article 3

This Decision is addressed to:

1. ANL Singapore Pte Ltd
The Metropolis, 9 North Buona Vista drive #03-02, The Metropolis Tower 1, 138588 Singapore, Singapore
2. A.P. Møller - Mærsk A/S
Esplanaden 50, DK-1263 Copenhagen K, Denmark
3. China Shipping Container Lines (Shanghai) Co., Ltd
13/F No.628 Minsheng Road, Shanghai, 200135, P.R. China
4. China COSCO Holdings Company Ltd
8/F No. 658, Dong Da Ming Road, Shanghai, 200080, P.R. China
5. CMA CGM Société Anonyme à Conseil d'Administration
4 quai d'Arenc, 13235 Marseille cedex 02, France
6. Cosco Container Lines Co., Ltd
378 Dong Da Ming Road, Shanghai, 200080, P. R. China
7. Evergreen Marine Corp. (Taiwan) Ltd.
No 163 Sec. 1, Hsin-Nan Road, Luchu District, Taoyuan County, 33858 Taiwan
8. Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG
Willy-Brandt-Straße 59-61, 20457 Hamburg, Germany
9. Hanjin Shipping Co., Ltd.
25 Gukjegeumyung-ro 2(i)-Gil, Yeongdeungpo-Gu, Seoul 150-949, South Korea
10. Hapag-Lloyd AG
Ballindamm 25, D-20095 Hamburg, Germany
11. Hapag-Lloyd Pte Ltd
200 Cantonment Road 08-03, 089763 Singapore
12. Hyundai Merchant Marine CO., LTD
Hyundai Group Building (East Building), 194, Yulgok-ro, Jongno-gu, Seoul 110-754, South Korea

13. Hyundai Merchant Marine (EUROPE) LTD
4th Fl. City Reach, 5 Greenwich View Place, Millharbour, E14 9NN London, United Kingdom
14. Mitsui O.S.K. Lines, Ltd
1-1 Toranomom 2-chome, Minato-ku, 105-8688 Tokyo, Japan
15. MOL (Europe) B.V.
Hofhoek 7, 3176 PD Poortugaal, The Netherlands
16. MOL Liner Limited
28/F, Tower 1, Ever Gain Plaza, 88 Container Port Road, Kwai Chung, N.T., Hong Kong, China
17. MSC Mediterranean Shipping Company Holding SA
12-14 Chemin Rieu, 1208 Geneva, Switzerland
18. MSC Mediterranean Shipping Company SA
12-14 Chemin Rieu, 1208 Geneva, Switzerland
19. Nippon Yusen Kabushiki Kaisha
Yusen Bldg., 3-2 Marunouchi 2-chrome, Chiyoda-ku Tokyo, 100-0005, Tokyo, Japan
20. NYK Container Line, Ltd
Sumitomo Shoji Nishikimachi Bldg.8F, 6-banchi Kanda nishikicho 1-chome, Chiyoda-ku Tokyo, 101-0054, Japan
21. NYK Group Europe Ltd
Level 11, 25 Canada Square, Canary Wharf, E14 5LQ, London, United Kingdom
22. NYK Line (H. K.) Ltd
Level 35, Tower 1, Kowloon Commerce Centre 51 Kwai Cheong Road, Kwai Chung New Territories, Hong Kong
23. NYK Line (Thailand) Co, Ltd
2525 One FYI Center, 2nd and 7th Floor, Rama 4 Road, Klongtoey, Klongtoey, Bangkok 10110, Thailand
24. Orient Overseas (International) Limited
33/F., Harbour Centre, 25 Harbour Road, Wanchai, Hong Kong, China

25. Orient Overseas Container Line Limited
33/F., Harbour Centre, 25 Harbour Road, Wanchai, Hong Kong, China
26. United Arab Shipping Company (S.A.G)
Al Garhoud Road, Deira, P.O. Box 55586, Dubai, UAE
27. Zim Integrated Shipping Services Ltd
9 Andrei Sakharov St., M.T.M. Center, Haifa 3508409, Israel
- Done at Brussels, 7.7.2016

*For the Commission
Margrethe VESTAGER
Member of the Commission*

