UNITED STATES OF AMERICA
BEFORE THE FEDERAL MARITIME COMMISSION

Gemini Cooperation Agreement Agreement No. 201429	Docket No. FMC-2024-0013

DEPARTMENT OF JUSTICE COMMENT ON
GEMINI COOPERATION AGREEMENT

The Antitrust Division of the United States Department of Justice appreciates the opportunity to comment on the proposed "Gemini Cooperation Agreement," No. 201429.[1] As written, the proposed agreement would allow two of the world's largest cargo shippers and former rivals—Maersk A/S ("Maersk") and Hapag-Lloyd Aktiengesellschaft ("Hapag-Lloyd")—to collaborate, rather than to compete, on allocating transport capacity in an industry already dominated by alliances among large competitors. As such, it poses a serious risk of anticompetitive effects.

As we have noted previously, "[t]he Department has long taken the position that the general antitrust exemption for international ocean shipping carrier agreements is no longer justified . . . The ocean shipping industry exhibits no extraordinary characteristics that warrant departure from competition policy."[2] Furthermore, "[p]rice fixing and other anticompetitive practices by the industry over the years have imposed substantial costs on our economy through higher prices on a wide variety of goods shipped by ocean transportation. However, to the extent that ocean carrier agreements continue to be immunized under the 1984 Shipping Act, it is important for the

[1] *See* Fed. Reg. Doc. No. 2024-15640 (July 16, 2024).
[2] Letter from Renata Hesse, Assistant Att'y. Gen., Antitrust Div., U.S. Dep't. of Justice, to Sec'y of the Fed. Mar. Comm'n 2 (Sept. 19, 2016), https://www.justice.gov/atr/file/909131/dl (regarding the OCEAN Alliance Agreement, FMC Agreement No. 012426) ("OCEAN Alliance Letter").

agreements to be limited and precise, as it is well-settled that antitrust immunities should be construed as narrowly as possible."[3]

Unless modified or blocked, the Gemini Agreement—which comes on the heels of other large alliances in the ocean shipping sector over which the Department has expressed skepticism to the Commission[4]—threatens competition. Accordingly, we urge the Commission to carefully scrutinize the terms and competitive effects of the agreement, and, if necessary, to prevent the agreement from going into effect. We further urge that the Commission require the parties to provide additional information where key terms are omitted from the agreement, and should it go into effect, ensure the agreement is narrowly tailored to achieve any procompetitive benefits while limiting the risk of anticompetitive harm. The Antitrust Division stands ready to lend its expertise and support as the Commission examines the agreement or prepares to block it.

I. Background

The Department and Commission share responsibility for ensuring robust competition in the shipping industry. The Antitrust Division is broadly charged with enforcing the nation's antitrust laws, while the Commission is charged with ensuring that international shipping agreements that are otherwise exempt from those laws are not likely to reduce competition.[5] The Division participates before agencies such as the Commission "in administrative proceedings which require consideration of the antitrust laws or competitive policies,"[6] and it offers views to

[3] *Id.*
[4] *See* OCEAN Alliance Letter; Letter from Renata Hesse, Assistant Att'y. Gen., Antitrust Div., U.S. Dep't. of Justice, to Sec'y of the Fed. Mar. Comm'n, (Nov. 22, 2016), https://www.justice.gov/atr/page/file/913521/dl?inline ("THE Alliance Letter").
[5] *See* 46 U.S.C. § 41307.
[6] 28 C.F.R. § 040(b).

agencies regarding their actions' effects on "the maintenance and preservation of competition under the free enterprise system."[7]

The Division and Commission have found several ways to increase their cooperation in the past few years. In 2021, the two agencies formalized a partnership to share information with one another, based on mutual concerns that consolidation in the shipping industry had led to increased opportunities for anticompetitive—and, specifically, criminally collusive—conduct.[8] For example, in recent years, the Department and Federal Bureau of Investigation uncovered and prosecuted an extensive, worldwide criminal conspiracy by many of the world's largest shipping companies and their executives to fix prices, rig bids, and allocate markets for deep-sea ocean shipping of roll-on, roll-off cargo (such as cars and trucks). This investigation resulted in felony criminal charges against 13 executives and 5 companies, which collectively paid over $255 million in criminal fines.[9] Several years prior, the Department successfully prosecuted several shipping companies and executives for their roles in a price-fixing conspiracy among carriers of domestic freight between the continental U.S. and Puerto Rico.[10] These and other cases illustrate why the

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[7] *Id*. § 040(g).

[8] Memorandum of Understanding between the Fed. Mar. Comm'n and the Antitrust Div., Dep't of Justice Relative to Cooperation with Respect to Promoting Competitive Conditions in the U.S. International Ocean Liner Shipping Industry (July 12, 2021), https://www.justice.gov/opa/press-release/file/1411101/dl.

[9] *See* Press Release, *Two International Shipping Executives Indicted for Participating in Long-Running Antitrust Conspiracy*, U.S. DEP'T OF JUSTICE (June 26, 2019), https://www.justice.gov/opa/pr/two-international-shipping-executives-indicted-participating-long-running-antitrust; Press Release, *WWL to Pay $98.9 Million for Fixing Prices of Ocean Shipping Services for Cars and Trucks*, U.S. DEP'T OF JUSTICE (July 13, 2016), https://www.justice.gov/opa/pr/wwl-pay-989-million-fixing-prices-ocean-shipping-services-cars-and-trucks.

[10] Press Release, *Florida-Based Crowley Liner Services Inc. Pleads Guilty to Price Fixing on Freight Services Between U.S. and Puerto Rico*, U.S. DEP'T OF JUSTICE (Aug. 1, 2012), https://www.justice.gov/opa/pr/florida-based-crowley-liner-services-inc-pleads-guilty-price-fixing-freight-services-between; Press Release, *Former Sea Star Line President Sentenced to Serve Five Years in Prison for Role in Price-Fixing Conspiracy Involving Coastal Freight Services*

Department and Commission are so concerned about competition in the shipping industry, and explain in part why, in 2022, our offices publicly reaffirmed our partnership with one another.[11]

Competition in the shipping industry has also been prioritized more broadly. For instance, in his Executive Order on Promoting Competition in the American Economy, the President recognized that "the global shipping container industry has consolidated into a small number of dominant foreign-owned lines and alliances, which can disadvantage American exporters."[12] Additionally, Congress passed, and the President signed, the Ocean Shipping Reform Act of 2022. Among other things, that law clarified that two purposes of the Shipping Act—the governing statute of the Commission—are to "ensure an efficient, *competitive*, and economical transportation system in the ocean commerce of the United States" and to "promote the growth and development of United States exports through a *competitive* and efficient system for the carriage of goods by

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Between the Continental United States and Puerto Rico, U.S. DEP'T OF JUSTICE (Dec. 6, 2013), https://www.justice.gov/opa/pr/former-sea-starline-president-sentenced-serve-five-years-prison-role-price-fixing-conspiracy. In 2012, the Department also successfully investigated the Freight Forwarders cartel, a criminal conspiracy among 14 global companies to fix the prices of various fees charged by freight forwarders for international shipments of cargo by air and ocean. The investigation involved multilateral mutual assistance and collaboration with antitrust regulators around the world—leading to the prosecution and guilty pleas of 14 companies, who collectively paid more than $100 million in criminal fines. *See* Press Release, *Japanese Freight Forwarder Agrees to Plead Guilty to Criminal Price-Fixing Charges*, U.S. DEP'T OF JUSTICE (Sept. 19, 2012), https://www.justice.gov/opa/pr/japanese-freight-forwarder-agrees-plead-guilty-criminal-price-fixing-charges.

[11] Press Release, *Justice Department and Federal Maritime Commission Reaffirm and Strengthen Partnership to Promote Fair Competition in the Shipping Industry*, U.S. DEP'T OF JUSTICE (Feb. 28, 2022), https://www.justice.gov/opa/pr/justice-department-and-federal-maritime-commission-reaffirm-and-strengthen-partnership.

[12] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021), https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-americaneconomy.

water in the foreign commerce of the United States, and by placing a greater reliance on the marketplace."[13]

Given our agencies' shared interest in promoting competition and increasing concerns about consolidation in the shipping industry, it is vital for the Commission to use its enforcement powers to protect competitive conditions. In reviewing proposed joint ventures between ocean shipping companies such as the one at issue here, the Commission may reject such proposals where appropriate,[14] including when an agreement is "likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost."[15]

The Commission therefore has an important role in ensuring meaningful competition in the shipping industry by carefully scrutinizing proposed joint ventures. With these principles in mind, we examine how the Gemini Agreement could reduce competition and increase transportation costs.

II. Significant Risk of Harm to Competition from the Agreement

The Gemini Agreement, if implemented, could have a significantly harmful effect on the shipping industry. The parties—Maersk and Hapag-Lloyd—are the second and fifth largest container shipping companies in the world respectively[16]; they plan to share cargo slots on

[13] Pub. L. 117–146, June 16, 2022, 136 Stat. 1274 at § 2 (codified at 46 U.S.C. § 40101(2), (4)) (emphases added).
[14] *See, e.g.*, 46 U.S.C. § 40303.
[15] 46 U.S.C. § 41307(b)(1).
[16] *Leading ship operator's share of the world liner fleet as of April 16, 2024*, STATISTA (2024), https://www.statista.com/statistics/198206/share-of-leading-container-ship-operators-on-the-world-liner-fleet.

approximately 290 vessels, with Maersk contributing around 174 and Hapag-Lloyd 116[17] (over 40% of its fleet).[18] The agreement contemplates cooperation between the companies across a vast swath of the world, between Europe, Asia, the Middle East, and the U.S. Pacific, Atlantic, and Gulf Coasts.[19]

The agreement, if implemented, would not only be vast in geographic coverage; it is vast in scope and contemplates extensive collaboration between competitors. The agreement could potentially reduce competition and raise prices for shippers—which may in turn raise prices for consumers—in at least three ways.

First, the agreement calls for the parties to agree on the number of vessels in their shared network, where new vessels are deployed,[20] and, apparently, the volume of cargo that each party ships at particular terminals through the agreement.[21] This would enable the parties to jointly determine shipping capacity (i.e., output), and joint decision-making among competitors—or concerted activity—is inherently fraught with anticompetitive risk.[22] The parties can also agree on

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[17] Press Release, *Maersk and Hapag-Lloyd are entering into an operational cooperation*, MAERSK (Jan. 17, 2024), https://www.maersk.com/news/articles/2024/01/17/maersk-and-hapag-lloyd-are-entering-into-an-operational-cooperation.

[18] *Facts & Figures*, HAPAG-LLOYD, https://www.hapag-lloyd.com/en/company/about-us/facts---figures.html (last visited Aug. 8, 2024).

[19] Gemini Cooperation Agreement, Hapag-Lloyd Aktiengesellschaft and Hapag-Lloyd USA LL–Maersk, art. 4, May 31, 2024, FMC Agreement No. 201429 ("Agreement").

[20] *Id.* art. 5A1(a) ("The Parties are authorized to discuss and agree on the size, number and operational characteristics (including age and speed) of Mainline Network vessels to be operated" and on "the possible future deployment of new buildings").

[21] *Id.* art. 5C.1(a) (parties may "agree on the volume of cargo to be transhipped by each of them at non-U.S. hub terminals").

[22] *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768–69 (1984) ("Concerted activity . . . deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. . . . This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction."). *See also Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 100 (1984) (noting that "output limitation[s] are ordinarily condemned as a matter of law"). The agreement also prohibits the parties from sub-chartering slots to any third parties without prior

the "structure and scheduling of the services" they provide,[23] which could entail deciding which of them will serve particular shipping routes—indeed, the Gemini Agreement itself provides that Maersk vessels alone will operate the parties' "Shuttle Network" serving nonmajor ports.[24] If the parties decided that only one of them would serve a route where they previously competed, that could constitute market allocation, or make the parties' decision-making less responsive to customer requests.[25] Absent special circumstances, agreements among competitors to allocate markets or cap supply are per se unlawful.[26] The agreement thus must be carefully examined to ensure that it does not threaten to lower shipping capacity or raise prices on critical routes.

A recent Division case demonstrated the significant anticompetitive harm that can result when former rivals agree to collaborate, rather than compete, on where they allocate transport capacity. The Division challenged the "Northeast Alliance" (NEA) between American Airlines and JetBlue Airways, in which American and JetBlue agreed to "jointly determine which airline will fly which routes in and out of the NEA region, how often and on what schedule they will serve each route, and which aircraft (i.e., how many seats) will be used on each route."[27] The district court held that these provisions of the NEA harmed competition and consumers by eliminating the parties' competition on output, allocating markets, and reducing consumer choice,[28] and concluded that the NEA violated the Sherman Act.

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consent of the other party, unless the slots are sub-chartered to an affiliate. Agreement art. 5A.2 (d). This provision has the potential to further restrict industry-wide capacity by making the parties' slots less available to competing non-affiliated parties.

[23] Agreement art. 5A.1(c).

[24] *Id.* art. 5B.1.

[25] *See, e.g.*, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 50 (1990) (per curiam).

[26] *See, e.g.*, *id.* at 49-50 ("agreements [to allocate markets] are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other."); *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 100.

[27] *United States v. Am. Airlines Grp. Inc.*, 675 F. Supp. 3d 65, 74 (D. Mass. 2023).

[28] *Id.* at 113-14, 116-17.

The Gemini Agreement could cause similar harms, given that Maersk and Hapag-Lloyd will be collaborating on shipping capacity decisions and thus may have diminished incentives to compete in covering large parts of the world. It is foreseeable that the partners will agree to coordinate schedules, call on certain ports less frequently, call on fewer ports, and more. As partners in the Gemini Agreement, Maersk and Hapag-Lloyd will share an interest in "ensuring the [venture] succeeds over the long term," which could suppress their "incentive for intra-partnership competition."[29]

Beyond the above areas of coordination, the parties may also "agree on the allocation of terminal costs other than costs incurred in connection with [their] containers."[30] These terms potentially conflict with the parties' commitment, earlier in the agreement, to negotiate with terminal operators independently.[31] By allowing the parties to coordinate on which terminals to use, and to share their terminal costs, the parties give themselves significant leverage (and potentially monopsony power) over U.S. terminal operators.

Concerns about the agreement's anticompetitive potential are especially acute in the context of the container shipping industry's existing web of agreements among competitors, including alliances among some of the world's largest container shippers.[32] To understand the full competitive landscape, we encourage the Commission to consider the Gemini Agreement as part of a broader trend of consolidation of ocean carriers. This trend has taken the form of alliances and of merger activity, such as the 2017 merger of Hapag-Lloyd and the United Arab Shipping

[29] *Id.* at 86.
[30] Agreement art. 5C1(e).
[31] *Id.* art. 5C.1(d).
[32] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021), https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-americaneconomy; *see also* OCEAN Alliance Letter (describing the small number of major shipping alliances); THE Alliance Letter (describing the small number of shipping alliances).

Company, and the 2017 acquisition of Orient Overseas (International) Limited (OOIL) by Cosco Shipping.[33] In 2022, the Division's investigation into the proposed acquisition of Maersk Container Industry A/S and Maersk Container Industry Qingdao Ltd. (collectively, MCI) by China International Marine Containers Group Co. Ltd. (CIMC)—which would have resulted in a 90 percent control over refrigerated and insulated container box production—resulted in the abandonment of the deal.[34]

Second, the agreement authorizes the parties to discuss competitively crucial information, including ports of call, port rotation, itineraries, the schedule for vessels,[35] the time and place for phasing vessels in and out,[36] and on-time performance criteria.[37] Sharing this competitively sensitive information between competitors can lead to significant anticompetitive harm. Collectively, however, the provisions raise concerns beyond information sharing; they contemplate the parties' jointly making decisions based on this competitively sensitive information, making it

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[33] *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 37 (D.D.C. 2022) (explaining that "high concentration must be considered in the context of an undeniable trend in consolidation" in the industry); Press Release, *Hapag-Lloyd and UASC complete merger*, HAPAG-LLOYD (May 24, 2017), https://www.hapag-lloyd.com/en/company/ir/financial-news/financial-news.iry-2017.irid-1626049.html; Press Release, *Cosco Shipping Holdings and SIPG Jointly Offer to Acquire OOIL*, OOCL (July 9, 2017), https://www.ooilgroup.com/newsroom/pressrelease/2017/Documents/COSCO%20SHIPPING%20HOLDINGS%20AND%20SIPG%20JOINTLY%20OFFER%20TO%20ACQUIRE%20OOIL%20ENG.PDF; *see also* OCEAN Alliance Letter (describing how global liner carriers combined via mergers and alliances).

[34] *See* Press Release, *Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation*, U.S. DEP'T OF JUSTICE (Aug. 25, 2022), https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk.

[35] Agreement art. 5A.1(c).

[36] *Id.* art. 5A.1(d). This clause is of particular concern, because the parties could phase vessels into or out of use to throttle supply and raise prices, a practice that has occurred in other industries. *See, e.g.*, Frank A. Wolak and Shaun D. McRae, MERGER ANALYSIS IN RESTRUCTURED ELECTRICITY SUPPLY INDUSTRIES: THE PROPOSED PSEG AND EXELON MERGER (2006).

[37] Agreement art. 5A.1(c).

easier for the parties to collude—either explicitly or implicitly—to throttle capacity, increase prices for shippers (and, in turn, consumers), and reduce leverage for shippers. Whether such communication is explicit or implicit, the result could be the same: reduced shipping operations that result in increased costs for shippers (and, in turn, consumers).

Third, independent of any specific discussion topics, the Gemini Agreement creates channels for collusion or anticompetitive coordination. In particular, the agreement authorizes the parties "to establish such standing and/or ad hoc committees as they deem necessary or appropriate for the efficient administration of this Agreement."[38] This provision allows the parties to take undefined steps to coordinate joint operations, without any meaningful limitation. Persistent, open-ended cooperative arrangements between competitors, though sometimes competitively benign, can become a channel for competitors to coordinate on price and output.[39] The potential for collusion is especially stark since the Gemini Agreement would become one of only a few major shipping alliances (together comprising over 80% of the global container ship capacity[40]) in a sector that has previously been subject to price fixing and other anticompetitive practices.[41]

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As the Commission is aware, once an agreement among ocean carriers is filed with the Commission and becomes effective, conduct covered in the agreement may become immunized from the antitrust laws.[42] As discussed above, the Department has long taken the position that the

[38] *Id.* art. 6.1.
[39] *See generally* Willard K. Tom, Couns. to the Assistant Att'y. Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the 31st Annual Symposium on Associations and Antitrust: Antitrust and Trade Associations (Feb. 22, 1995), https://www.justice.gov/atr/speech/antitrust-and-trade-associations.
[40] International Transport Forum, *The Impact of Alliances in Container Shipping*, OECD (2018), https://www.itf-oecd.org/sites/default/files/docs/impact-alliances-container-shipping.pdf
[41] *See* discussion *supra* pp. 3-4.
[42] 46 U.S.C. § 40307.

general antitrust exemption for international ocean shipping carrier agreements is no longer justified, as the ocean shipping industry exhibits no extraordinary characteristics that warrant departure from competition policy. Nonetheless, should the exemption continue to apply, it is important for any approved agreements to be limited and precise. Where, as here, the agreement does not provide all the key information necessary to assess competitive effects, caution is warranted to avoid giving parties carte blanche in executing the agreement. For example, the Gemini Agreement contemplates sharing costs[43] and vaguely authorizes Maersk and Hapag-Lloyd to "discuss and agree on the financial terms and conditions applicable to the provision and use of slots."[44] Cost-sharing terms and financial terms for provision of slots could significantly affect the parties' competitive incentives, but there is no way to evaluate these incentives because there are no commercial terms specified in the agreement. The Commission should therefore ensure that any ambiguous provisions are modified or eliminated.

Other remedies may also be appropriate based on the competitive concerns described above. In general, antitrust remedies should seek to fully resolve any competitive problems, so that competition is effectively preserved. Here, the agreement's generic assurances of compliance appear insufficient to address the competition concerns it raises. As written, the agreement claims that it shall not "restrict the ability of either Party to offer or agree commercial terms with its customers,"[45] and directs that "[e]ach Party's competition compliance functions shall monitor compliance with the above provisions."[46] It further directs that "no information which is commercially sensitive will flow directly or indirectly between them under this Agreement, other

[43] Agreement art. 5A.1(g).
[44] *Id*. art. 5A.2(c).
[45] *Id*. art. 15.2.
[46] *Id.* art. 13.4.

than where this Agreement specifically permits them to do so and subject to compliance with all measures and safeguards."[47] Such directions amount to little more than general admonitions to comply with the law. The avenues created by the agreement to share information and jointly set shipping capacity and customer prices may invite collusion that even the best-intentioned compliance counsel would find difficult to adequately police.

Congress gave the Commission the authority to review and block ocean carrier agreements prior to their implementation to prevent anticompetitive harms,[48] and we urge the Commission to exercise this authority where it identifies a risk of anticompetitive effects of the agreement. Accordingly, it may be preferable to enjoin or revise the Gemini Agreement rather than to rely on the participants self-monitoring.

III. Conclusion

The Department of Justice and the Federal Maritime Commission share a mission to protect competition in the shipping industry. Unless modified or blocked, the Gemini Agreement threatens this competition, and the Department recommends that the Commission scrutinize it with skepticism. At minimum, the Division encourages the Commission to ensure that the Gemini Agreement is narrowly tailored to achieve any procompetitive benefits while limiting the risk of anticompetitive harm. The Department stands ready to assist the Commission with any economic, industry, or antitrust expertise that may be helpful to the Commission in determining its next steps. The Department is also ready to assist if the Commission chooses to prevent the agreement from going into effect.

[47] *Id.* art. 13.1.
[48] 46 U.S.C. § 41307.

Respectfully submitted,

Jonathan Kanter
Assistant Attorney General

John Elias
Deputy Assistant Attorney General

David Lawrence
Director of Policy

Yixi (Cecilia) Cheng
Counsel to the Assistant Attorney General

Karina B. Lubell, Chief
Brendan Ballou, Special Counsel
Competition Policy and Advocacy Section

Matthew A. Waring, Trial Attorney
Appellate Section

U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

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