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4 November 2021

Mr Rasul Butt
Chief Executive Officer
Competition Commission
19/F, South Island Place
8 Wong Chuk Hang Rd
Wong Chuk Hang, Hong Kong

Dear Mr Butt,

Re: Review of the Competition (Block Exemption For Vessel Sharing Agreements) Order 2017

The Hong Kong General Chamber of Commerce welcomes the opportunity to express our views on the subject consultation.

The shipping and logistics sector, a major pillar in Hong Kong's economy, has and continues to suffer from major disruptions as a result of Covid-19. For this reason and to maintain a stable and predictable operating environment, we support extending the Competition (Block Exemption for Vessel Sharing Agreements) Order (the Order) in its current form for another term of five years.

We also reiterate our call to remove the market share limit for vessel sharing agreements currently imposed under the Order for the reasons as detailed in the attached response.

We hope you will give our comments your due consideration.

Yours sincerely,

George Leung
CEO

Encl.

Competition Commission's Review of the Competition (Block Exemption for Vessel Sharing Agreements) Order 2017 ("the Review")

Submission by The Hong Kong General Chamber of Commerce ("HKGCC")

1. Introduction

1.1. Trading and logistics have been for many years one of Hong Kong's key industries.[1] Our container port is one of the main reasons for Hong Kong's economic success. As the Government has recently said:

"The port has always been a key factor in the development and prosperity of Hong Kong, which is strategically located on the Far East trade routes and is in the geographical centre of the now fast-developing Asia- Pacific Basin. In terms of tonnage of shipping using its facilities, cargo handled and the number of passengers carried, Hong Kong is one of the major ports of the world".[2]

1.2. Hong Kong's regulation of the major customers of the port, the container shipping lines, therefore has an indirect, but nonetheless potentially important, impact on Hong Kong's economy. Public consultation is, as the Commission has noted, an important part of the Review. HKGCC welcomes this opportunity to give its input to the Review.

1.3. The Commission identifies three options with regard to the Block Exemption Order ("BEO"), which is currently in force until 8 August 2022, namely (a) to renew the BEO in its current form; (b) to renew it subject to amendments; or (c) to let it expire on 8 August 2022.

1.4. In summary, HKGCC's view is that the BEO should be renewed, for the same period as it is currently in force (namely five years), but subject to an important amendment. The amendment is that the market share limit of 40 per cent for vessel-sharing agreements (VSAs), which is currently a condition of the BEO,[3] should be removed.

1.5. We set out below first our reasons as to why the BEO should be renewed for five years, and secondly why the existing market share limit for VSAs should be removed. We then answer (to the extent possible) the specific questions raised by the Commission in its notice of 5 August 2021 concerning the Review.

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[1] For the latest statistics, see https://www.censtatd.gov.hk/en/scode80.html

[2] "Hong Kong: The Facts: The Port" (August 2021), available at https://www.gov.hk/en/about/abouthk/factsheets/docs/port.pdf

[3] See BEO paras 7(a) and 8, available at https://www.compcomm.hk/en/enforcement/registers/block_exemption/files/Block_Exemption_Order_and_Guidance_Note_final.pdf

2. The BEO should be renewed for five years

2.1. In deciding to issue the BEO, the Commission considered whether VSAs gave rise to any potential harm to competition and if so, whether such potential harm to competition was outweighed by the efficiencies generated by VSAs.

2.2. In essence, the Commission took the view that VSAs raise some potential competition concerns,[4] but that (subject to the market share limit, which is discussed in the next section below) such potential competition concerns are outweighed by the efficiencies that VSAs generate.[5]

2.3. We agree with the Commission's assessment that any potential harm to competition arising from VSAs is outweighed by their clear efficiencies.

2.4. The potential harm identified in the Commission's statement of reasons appeared to be largely hypothetical. For example, the Commission stated that VSAs "*could potentially* lead to competition concerns" and that they "*could potentially* enable a softening of competition between VSA members" (emphasis added.[6] (Moreover, the Commission did recognise that there was *actual* competition between VSA members, and between VSA members and non-members "on price and other competitive parameters such as customer service").[7]

2.5. Regarding efficiencies, on the other hand, the Commission conducted a rigorous examination of the evidence and arguments put forward by the applicant, and concluded that it had satisfied the burden of proving them.

2.6. We have no information to suggest, or reason to believe, that the efficiencies of VSAs do not continue emphatically to outweigh any potential harm to competition that may arise from them. We therefore submit that the BEO should be renewed. The next question is: for how long?

2.7. The duration of the current BEO is five years. Given the extent to which the world economy (including Hong Kong's) has been adversely affected by the pandemic, we advocate an extension of the BEO for the same period for which the current BEO was issued, namely five years. This would give the industry the stability and confidence to make future investments in what is an extremely capital-intensive industry, in the knowledge that their arrangements would be compliant with Hong Kong's competition law.

3. The market share limit should be removed

3.1. In explaining its decision to impose the market share limit of 40 per cent, the Commission stated:

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[4] Paras 4.7- 4.11.
[5] Paras 4.20- 4.57.
[6] Paras 4.7 and 4.9 respectively.
[7] Para 4.11.

3.2. "As a general matter, it is only appropriate to offer the benefit of a block exemption order where there is sufficient certainty that the potential harm to competition which arises does not outweigh any efficiencies created by the agreements. The Commission considers that such certainty arises only in respect of VSAs which do not exceed the market share limit".[8]

3.3. In other words, the Commission's view was that it was sufficiently certain that the proven efficiencies of VSAs would outweigh the Commission's potential (and largely hypothetical) competition concerns about them if the VSA parties' combined market share was 40 per cent or below. But it was not sufficiently certain of this if their combined market share was above 40 per cent. On that basis, the benefit of the block exemption was denied to VSAs where the parties' combined market share was above 40 per cent.

3.4. In our response to the Commission's consultation on the BEO, we opposed the concept of a proposed market share limit.[9] On the assumption that the efficiencies of VSAs continue to outweigh any potential harm to competition they might cause and therefore the BEO is renewed (if the reverse was the case the BEO would presumably not be renewed), we submit that the current market share limit in the BEO should be removed. The reasons are as follows:

3.4.1. Such a limit could have the chilling effect of discouraging shipping lines from competing to increase their market share lest they cross the market share limit (which would be contrary to the Competition Ordinance's objectives). Alternatively, where the shipping lines were at risk of crossing the market share limit, they would have to "self-assess" whether the efficiencies of VSAs outweighed their potential competitive harm, or apply to the Commission for an individual decision to this effect, either of which courses of action would involve considerable uncertainty and expense. All of these outcomes are avoidable, in a way which would also address any concerns the Commission might have, as noted in (3.4.3) below.

3.4.2. The selection of a market share limit which is considered appropriate - whether 40 per cent, 50 per cent or another figure - is a largely arbitrary exercise.

3.4.3. Rather than imposing a market share limit, based on a hypothetical concern that exceeding the market share limit could reverse the balance between efficiencies and potential harm to competition, it would be preferable to make this assessment and decision based on the actual situation. The Ordinance provides an appropriate mechanism for doing this. It states that the Commission can review a BEO *at any ti*me if it considers it appropriate to do so.[10] One of the criteria listed in the Ordinance for such a review is "whether any significant new information relating to the particular category of agreement has come to the

[8] Para 4.16.
[9] https://www.chamber.org.hk/FileUpload/201612191154572503/Consultation.pdf
[10] Competition Ordinance, s 19(2).

knowledge of the Commission".[11] So if in future the Commission (whether on a complaint or on its own initiative) found that VSAs were causing *actual* significant harm to competition which was not outweighed by their efficiencies, it could review and if necessary withdraw the BEO. In our view, this would be a more appropriate tool than a market share limit, since it incentivises the parties to continue to ensure that efficiencies outweigh potential competitive harm, rather than potentially discouraging them from competing for market share. It would also enable the assessment to be based on the actual situation, as opposed to a hypothetical concern about possible future developments.

3.4.4. We note that in Singapore, the BEO has never been subject to such a market share limit: parties to liner shipping agreements with a combined share of over 50 per cent are merely required to file them with the Singapore Competition Commission, if they are to benefit from the BEO.[12] Moreover, we note that, in its recent consultation paper on the future of the BEO when it expires on 31 December 2021, the Singapore Competition Commission does not appear to be proposing even a filing requirement in the renewed BEO.[13]

3.4.5. Whilst we are not suggesting that the Commission is required to follow Singapore's example, we would recommend against imposing more stringent requirements than Singapore unless they are necessary, particularly given that our container port is a close competitor of Singapore's for transhipment traffic.

4. Answers to the Commissions Questions

Market developments

Q1. What have been the major developments in the liner shipping industry since the issuance of the Order? For example, with regard to general market conditions, prices, service levels, the state of competition and the level of cooperation among shipping lines.

4.1. We defer to the industry, which is better-placed than us to answer this question.

Q2. What have been the impacts of the COVID-19 pandemic on the liner shipping industry? If so, how long do you expect that any such impacts will last?

4.2. One of main adverse impacts of the pandemic on the liner shipping industry is the global container shortage, and its knock-on effects.[14] For further details on

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[11] Competition Ordinance, s 19(3).
[12] See https://sso.agc.gov.sg/SL/CA2004-OR1
[13] See https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/cccs-consults-on-proposed-recommendation-for--block-exemption-order-for-liner-shipping-agreements-14-july-2021
[14] For a discussion of this problem, see for example https://www.ship-technology.com/features/global-shipping-container-shortage-the-story-so-far/

this and other effects of the pandemic we defer to the industry, which is better-placed than us to answer this question.

Q3. To the extent not already addressed in (1) and (2), have there been any developments since the issuance of the Order that have taken place in the economy of Hong Kong or in the economy of any place outside Hong Kong that affect VSAs?

4.3. Yes. The adverse impact of the pandemic on the world economy has made it all the more important that the efficiencies generated by VSAs are allowed to be realised and maximised, in the absence of any clear and significant harm to competition that outweighs these efficiencies.

Competition concerns and efficiencies

Q4. Have there been any changes with respect to the competition concerns to which vessel sharing agreements may give rise since the issuance of the Order? In this respect, the Commission previously found that VSAs could potentially give rise to:

(a) reductions in service variety;
(b) capacity restrictions (where parties to the VSA had market power); and
(c) sharing of competitively sensitive information.

4.4. We note from the Commission's Statement of Reasons accompanying the BEO that these concerns appeared to be hypothetical. We have no information to suggest, or reason to believe, that these concerns have actually materialised.

Q5. Have there been any changes with respect to the economic efficiencies and resulting benefits to consumers in Hong Kong to which vessel sharing agreements may give rise since the issuance of the Order?

In this respect, the Commission previously found that VSAs could give rise to:

(a) broader service coverage and higher service frequency than if shipping lines were operating alone;
(b) cost efficiencies for shipping lines through use of larger vessels; and
(c) decreased costs of entry and expansion for shipping lines on particular trade routes.

4.5. We believe that all of the findings of the Commission regarding efficiencies remain valid.

Q6. With respect to the competition concerns and efficiencies addressed in Q4 and Q5, are there any differences in the situation before and during the COVID-19 pandemic? If so, please identify those differences.

4.6. Yes. The adverse impact of the pandemic on the world economy in general, and the trading sector in particular, makes it all the more important that the efficiencies of VSAs are allowed to be realised and maximised, in the absence of clear and significant actual harm to competition that outweighs these efficiencies.

Effectiveness of the Order

Q7. Does the Order continue to be merited and effective? In your response, please address:

4.7. The Order continues to be merited and effective, but in our view would be even more effective if the market share limit were deleted. See section 3 of this submission above, and our answer to this question and questions (9) and (10) below.

(a) The desirability of maintaining a stable and predictable regulatory environment in relation to competition for liner shipping; and

4.8. The BEO has the benefit of providing a stable and predictable regulatory environment, except where the parties to a VSA have a combined market share at or approaching the 40 per cent market share limit in the BEO. As explained in section 3 of this submission above, such parties are faced with the choice of either "self-assessing" whether the efficiencies of the VSA outweighs its potential competitive harm, or applying to the Commission for an individual decision to this effect. Both options would involve considerable uncertainty and expense. This is one reason why we believe a market limit is inappropriate, as discussed in section 3 above. In the interests of stability and predictability, we also submit that the BEO should be renewed for the same duration of the existing BEO - see section 2 of our submission above.

(b) The likely effects if the Order were allowed to expire.

4.9. If the Order were allowed to expire, *all* parties to VSAs (not only those at or approaching the market share limit) would be faced with the choice referred to in our answer in (a) above of having to conduct an economic "self-assessment" of the VSA, or applying to the Commission for an individual decision. As noted above, either of these options would entail considerable uncertainty and expense.

Q8. Have there been any material changes in the forms or terms of VSAs since the issuance of the Order?

4.10. We defer to the industry, which is better-placed than us to answer this question.

Market share limit

Q9. Have there been any changes in the market which would impact the appropriateness of the market share limit since the issuance of the Order?

4.11. We opposed the inclusion of a market limit in the current BEO, and we oppose the inclusion of a market share limit in any new BEO. Our reasons are explained in section 3 of this submission above.

Q10. In the context of intra-regional trades (for example, the intra-Asia trade), have there been any changes which suggest the market share limit should be applied by reference to a particular point-to-point route on the trade instead of by reference to the trade as a whole?

4.12. As we oppose the concept of a market share limit (see our answer to question 9 above), this question is not applicable to us.

Other matters

Q11. Please provide any further information, views or evidence you consider may assist the Commission in formulating a proposal on the future of the Order.

4.13. While the BEO only applies to VSAs, Singapore's BEO also applies to voluntary discussion agreements ("VDAs"). The current BEO in Singapore is due to expire on 31 December 2021. As the Commission is no doubt aware, the Singapore Competition Commission has recently noted, in its consultation paper on the future of the BEO, that the main container shipping lines, which provide services across continents and regions, "have largely withdrawn from price discussion agreements".[15] However, it noted that VDAs remain relevant to "feeders", which "provide liner shipping services to main line customers by providing space on the feeder's vessels for the containers (and cargoes) of main lines, usually on regional trade routes between Singapore and ports where main lines do not serve".[16]

4.14. While the Singapore Competition Commission is therefore proposing to let the BEO lapse in respect of VDAs between main lines (because they largely no longer exist), it is proposing that the BEO be renewed for VDAs between feeders. The reasons include the fact that recommended prices are not binding, and that:

4.15. "The anti-competitive effects from the use of such price discussion agreements for feeder services appear to be limited- main lines are generally not concerned with such discussions as surcharges imposed by feeders are still subject to negotiation with main lines who are likely to possess bargaining power".[17]

4.16. In the Statement of Reasons, the Hong Kong Competition Commission did not expressly distinguish between VDAs involving main lines, and those involving feeders. If feeder lines were to apply for a BEO for VDAs between them, HKGCC would consider supporting such an application, provided all the criteria under Schedule 1 paragraph 1 of the Ordinance were met.

5. <u>Conclusion</u>

5.1. We hope that you find the above comments helpful.

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[15] Note 13 above, para 16.
[16] Note 13 above, para17.
[17] Note 13 above, para 22.

5.2. We note, that after considering the information, views and evidence collected from this initial consultation, the Competition Commission will publish and consult on its proposed way forward. We look forward to responding to that consultation in due course.

HKGCC Secretariat
November 2021