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6 June 2022

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: Consultation on Proposal to Vary (Renew) 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.

We affirm our support of the Commission's proposed extension of the current block exemption order for liner shipping agreements ("the BEO"), for the same reasons as that stated in our response of 4 November 2021[1] to the Commission's initial consultation on the matter.

At the same time, we reiterate our call for extending the BEO for five years, instead of the four years currently proposed, as well as the removal of the market share cap where this relates to vessel sharing agreements.

We hope you will give our comments your due consideration.

Yours sincerely,

George Leung
CEO

Encl.

[1] https://www.chamber.org.hk/en/advocacy/policy_comments.aspx?ID=533

Competition Commission's Consultation on its Proposal to Vary (Renew) the Competition (Block Exemption for Vessel Sharing Agreements) Order 2017

Representation by The Hong Kong General Chamber of Commerce (HKGCC)

1. Introduction

1.1. On 5 May 2022, the Competition Commission invited representations on its above proposal, which is contained in a Notice issued under Section 20(2) of the Competition Ordinance ("the Notice"). HKGCC welcomes this opportunity to submit its representation on the Notice.

1.2. As we stated in our response of 4 November 2021 to the Commission's initial consultation on this matter ("our Previous Response"), it is important to maintain a stable and predictable legal and operating environment for the shipping and logistics sector, given that this sector is a major pillar of Hong Kong's economy, and that it has suffered major disruptions as a result of the pandemic. We therefore support the Commission's proposed extension of the current block exemption order for liner shipping agreements ('the BEO").

1.3. However, we re-iterate two points in our Previous Response, namely that:

(a) we continue to question the need for a market share limit in the BEO; and

(b) we advocate an extension of the BEO for the same period as the current BEO, namely five years, not the four years proposed in the Notice.

1.4. Before explaining our rationale on each of these two matters, we set out first the approach which we believe is the appropriate one to follow when considering the imposition of such conditions in a block exemption order.

2. Imposing Conditions in a BEO

2.1. We recognize that the analysis of whether the BEO should be renewed has to be conducted to a large extent within the framework set by the Competition Ordinance ("CO"). The Commission must assess whether the category of agreements for which the renewal is sought harms competition within the meaning of section 6 ("the First Conduct Rule"), and if so, whether the criteria for excluding this category of agreements from the First Conduct Rule on the grounds of overall economic efficiency, as set out in section 1 of Schedule 1 of the CO ("the efficiency criteria"), are satisfied.

2.2. In issuing the BEO in 2017, the Commission took the view that VSAs posed possible concerns about competition, but that they satisfied the efficiency criteria. In the Notice, it reaches a similar conclusion. We agree with the Commission's conclusion that any concerns about competition are outweighed by the clear efficiencies that VSAs generate.

2.3. However, when it comes to imposing conditions in a block exemption order, or in an extension thereof, the CO does not dictate what conditions should be imposed. The Commission has a discretion on this issue. In our view, how this discretion is exercised should follow international regulatory best practice, and a regulatory impact assessment (RIA) of the proposed conditions should be conducted, weighing the benefits of imposing the conditions against the costs of doing so. Conditions in the BEO should only be imposed, or retained, if it can be demonstrated, through evidence and not assumption or presumption, that the benefits of doing so exceed the costs. It is also internationally accepted that the least intrusive means of achieving the desired objective should be chosen. This approach is particularly important at this time, given the current challenges businesses are facing due to the pandemic.

2.4. In our view, such an assessment would show that the current market share limit should be removed in renewing the BEO, and that an extension of its term for the same duration as its initial term should be granted. We set our views on each of these two issues below.

3. The Proposed Market Share Limit

3.1. The market share limit in the current BEO seems to be based on the Commission's concern that, above a certain market share level, the *potential* harm to competition that may, according to the Commission's analysis, *hypothetically* be caused by VSAs, could outweigh the *actual* efficiencies that the Commission has found that they generate. The Commission has selected 40 per cent as that market share level, and proposes to impose the same market share level in the renewed BEO.

3.2. Assuming that the Commission's view that exceeding a certain market share level could change the balance between potential harm to competition and actual efficiencies is correct, and that intervention is needed to address this issue, the question is *how* to intervene.

3.3. One way is to select in advance a market share level above which it is *presumed* that the balance between potential harm to competition and actual efficiencies will be reversed. This is the approach that is chosen in the current BEO, and which the Notice proposes be continued in the renewed BEO (the "market share approach").

3.4. The alternative is to make no such presumption, and instead to rely on the mechanism already provided in section 20 of the CO, allowing the Commission to revoke or vary the BEO, if it considers that the criteria for the exclusion of VSAs from the First Conduct Rule on grounds of overall economic efficiency are no longer (as a matter of *fact*, rather than *presumption*) satisfied ("the factual approach").

3.5. As we stated in our Previous Response, we believe that the factual approach is the more appropriate one. It achieves the same objective as the market share approach, namely allowing the Commission to intervene, and if necessary to deny the benefit of the BEO, if VSAs no longer satisfy the criteria of the exclusion on grounds of overall economic efficiency. But it does so on the basis of *empirical* evidence that this is the case, rather than a *hypothetical ex ante* presumption that these criteria will no longer be met above a certain market share threshold. Moreover, it also avoids the other difficulties caused by the market share approach that we identified in our Previous Response, namely that:

3.5.1. The market share approach could have the chilling effect of discouraging shipping lines from competing to increase their market share, lest they cross the selected market share limit. Where 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;

3.5.2. These consequences should be avoided, if at all possible, in what are extremely challenging economic times for businesses. Legal certainty for businesses appears to have weighed heavily in the Commission's proposal to extend the BEO,[1] and we also believe it should be a relevant factor in assessing whether to impose such conditions in the BEO;

3.5.3. The selection of the market share limit under a market share approach is, by its nature, a largely arbitrary one. Decisions on matters such as market competition should preferably be based on facts, rather than assumptions or hypotheses, especially in these challenging economic times; and

3.5.4. The Commission has (rightly) recognised that international competition between ports is a relevant factor in deciding whether or not to renew the BEO.[2] Logically this should also, in our view, be a relevant factor for the Commission in deciding whether, and if so what, conditions to impose for its renewal. We note that the equivalent Singapore BEO contains no such market share limit, and if Hong Kong were to impose such a limit, this could put our port at a competitive disadvantage.

4. Duration of the Extended BEO

4.1. In our Previous Response, we advocated an extension of the BEO for the same period as the one for which it was initially granted, namely five years, in the interests of maximising stability for businesses in the shipping and logistics sector.

4.2. In the Notice, the Commission's analysis of developments since the original BEO was granted concludes that the economic efficiencies generated by VSAs continue to outweigh emphatically any concerns about potential harm to competition that they may create. We believe it is therefore logical and reasonable to extend the BEO for the same period as the initial BEO, namely a further five years, particularly given the Commission's power under the CO (as noted above) to revoke or vary the BEO, if necessary, before the expiry of the five years.

[1] Notice paras 75-79.
[2] Notice para 82.

4.3. The Commission has proposed a "slightly shorter term of four years", stating that it "considers there is benefit" in this shorter period. But the Notice does not explain what this benefit is.[3] Given that the Commission has also recognised the need for businesses to have legal certainty and stability, this would seem to argue for a longer, rather than a shorter, period of renewal.

4.4. The Commission refers to the fact that other jurisdictions have renewed their original block exemptions for shorter periods than their original block exemptions.[4] But it does not follow that Hong Kong should do the same. On the contrary, as noted above, the Commission recognises that international competition between ports is a relevant factor in its proposal to renew the BEO. Renewing the BEO for a longer period, when a shorter period is unnecessary, could give Hong Kong's port a competitive advantage in this respect.

5. Conclusion

5.1. The Commission's proposal to renew the BEO, and if so on what terms, will have important repercussions not just on liner shipping companies, but also on other stakeholders in Hong Kong's critical shipping and logistics sector, including container terminal operators, freight forwarders, and shippers. The sector has faced immense challenges due to the pandemic, and in renewing the BEO, we would urge the Commission to do so in the most proportionate way possible, as set out above.

HKGCC Secretariat
June 2022

[3] Notice para 86.
[4] Note 3 above.