

ROUTE TO CALMER SEAS?

HONG KONG COMPETITION COMMISSION PREPARED TO ACCEPT COMMITMENTS FROM THE SEAPORT ALLIANCE

The Hong Kong Competition Commission (HKCC) **announced** on 12 August 2020 that it is prepared to accept certain **proposed commitments** offered by the members of the Hong Kong Seaport Alliance (**Alliance**) to remedy the HKCC's concerns under the First Conduct Rule of the Competition Ordinance.

The Alliance is a contractual joint venture between four terminal operators in Hong Kong (**Members**). The Members of the Alliance are Hongkong International Terminals Limited (**HIT**), Modern Terminals Limited (**MTL**), COSCO-HIT Terminals (Hong Kong) Limited (**CHT**), and Asia Container Terminals Limited (**ACT**). They agreed to jointly operate and manage their 23 berths across eight terminals at Kwai Tsing port through operational, commercial and financial coordination. The fifth port terminal operator at Kwai Tsing port, Goodman DP World Hong Kong Limited (**DP World**), is not a party to the Alliance.

The HKCC took the unusual step of announcing on 10 January 2019 that it had an open investigation into the Alliance which it was conducting "as a matter of priority".

The HKCC's concerns

The HKCC has **identified** competition concerns in Gateway markets, which involves the handling of cargo arriving at Kwai Tsing by truck and departing by oceangoing vessel or vice versa, for onward transportation to and from the hinterland. The HKCC found the Members had a combined Gateway market share of over 90% in 2018, and there is a lack of effective competitive constraints at Kwai Tsing. Accordingly, the HKCC considers that Members are capable of increasing charges or reducing service levels to the detriment of their Gateway customers (whether shipping lines or other counterparties).

The HKCC also has concerns that the Alliance would reduce the provision of reciprocal overflow services, where one terminal operator allows another terminal operator's customers to berth - specifically to DP World, the only remaining competitor of the Alliance at Kwai Tsing port.

The Commitments

As the HKCC's key concerns focused on the alleged ability of the Members to increase prices or reduce service standards, the Members have offered five commitments under section 60 of the Competition Ordinance to address these concerns (**Commitments**):

1. cap their Gateway cargo handling charges to shipping lines at the level applied prior to implementation of the Alliance (i.e. 1 April 2019), subject to rises linked to indexation;
2. provide a minimum service level for gate access and turnaround time for truck services;
3. cap their Gateway cargo handling charges to non-shipping lines at the level applied prior to implementation of the Alliance (i.e. 1 April 2019), subject to rises linked to indexation;
4. maintain reciprocal overflow arrangements with DP World on no less favourable terms than as at the time of implementation of the Alliance (i.e. 1 April 2019), subject to rises linked to indexation; and
5. ensure that no MTL representatives appointed to serve on the Governing Committee of the Alliance are appointed as directors of the terminal operators of Shekou or Chiwan ports, to allay concerns around potential anti-competitive information flows between the Alliance and its competitors at Shekou and Chiwan ports.

The Commitments would last for up to eight years from their effective date, with the exception of the proposed commitment on service levels which would last for the duration of the Alliance. In addition, the Commitments would permit the Members to make a reasoned request to the HKCC to conduct a review of the Commitments after five years. The HKCC considers that the Commitments sufficiently address its concerns and proposes to accept them, subject to the feedback it receives from the public consultation process.

The Commitments demonstrate the pragmatic approach of the HKCC in accepting behavioural remedies to address its concerns. There are a few observations worth highlighting.

- **Price caps as a remedy.** Competition authorities often prefer to avoid becoming long-term price regulators because the price on the reference date, i.e. 1 April 2019 in this case, may not necessarily reflect the real 'competitive' price on an ongoing basis. Prices on 1 April 2019 was chosen because it was the day of implementation of the Alliance, but it is possible that these prices already reflected aspects of the agreement. Conversely, even if it were the 'competitive' price at that date, there is a risk the 1 April 2019 prices will seem outdated over the course of the minimum five to eight years initial period the Commitments will be in force for.
- **Minimum service levels could hinder incentive to improve.** Similarly, the minimum service levels specified in the Commitments may not reflect what is 'competitive' in the future. For example, if a new technology or market practice becomes accepted in the industry globally that would speed up the average minimum turnaround time, the Alliance may not have incentive to adopt this new technology or practice in Hong Kong.
- **Harm already caused during HKCC's investigation.** There is also the possibility that some harm to competition may potentially have already been caused to third parties. Given the Alliance was implemented on 1 April 2019, it is unclear what the Members have already implemented in relation to prices and service levels during the interim period (although it is possible that the HKCC was also mindful of this during its investigation). Shipping lines and other customers may already have been impacted while the HKCC was investigating the Alliance. This concern was reflected in some of the market feedback that the HKCC received on the Commitments, with the Hong Kong Shippers' Council noting that shippers have only seen increases in charges in the past two decades, without any reduction as a result of the alleged efficiencies flowing from the Alliance.
- **Role of the monitoring trustee.** Whilst the Commitments are ostensibly fairly straightforward, implementation of behavioural remedies is never easy. The monitoring trustee will play a very important and active role in ensuring both the proper implementation and strict compliance with the Commitments, which will be critical for the Commitments to be effective. This is the first time that a monitoring trustee has been required in Hong Kong and Members will have to walk the tightrope between ensuring the independence of the trustee and footing the bill for the trustee's work.

Public Feedback

Public consultation on the Commitments concluded on 26 August 2020, and the HKCC received nine [representations](#) in total.

While broadly supportive, some stakeholders did suggest changes to the Commitments. Shipping company Maersk and the Hong Kong Shippers' Council both challenged the Commitments for not ensuring that economic efficiencies generated by the Alliance are passed on to customers. To address this, Maersk suggested the addition of a new commitment to require the Alliance to pass on a reasonable share of any cost efficiencies generated. Maersk also suggested an open-ended duration for the Commitments with a possibility for the Alliance to request a consultation on the terms after a period of five years. On the subject of price-setting, the Hong Kong Shippers' Council also called for more detail and transparency around the indexation mechanism by which prices can move upwards. It remains to be seen whether (and how) the HKCC will reflect this feedback in the Commitments.



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