競爭事務委員會
COMPETITION COMMISSION

12 August 2020

Notice issued under section 2 of Schedule 2 to the Competition Ordinance regarding the Commission's proposal to accept commitments in the Hong Kong Seaport Alliance case (EC/03AY)

I. INTRODUCTION AND EXECUTIVE SUMMARY

The Commission's investigation

1. The Competition Commission ("**Commission**") has conducted an investigation under section 39 of the Competition Ordinance (Cap. 619) ("**Ordinance**") into a contractual joint venture between four terminal operators in the Hong Kong Special Administrative Region of the People's Republic of China ("**Hong Kong**"), referred to as the Hong Kong Seaport Alliance ("**Alliance**").

2. The four parties to 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**" and, together with HIT, MTL and CHT, "**Parties**"). The Alliance combines the Parties' respective terminal operator businesses at Kwai Tsing port ("**Kwai Tsing**").

3. Based on its investigation, the Commission has concerns that, by entering into the Alliance, the Parties may have made, and be giving effect to, an agreement which prevents, restricts or distorts competition in Hong Kong, potentially in contravention of the first conduct rule in section 6 of the Ordinance ("**First Conduct Rule**").

4. In particular, the Commission has assessed whether the Alliance gives rise to anti-competitive effects on three primary relevant markets, as well as certain related markets. It has found that:

    (a) the Alliance gives rise to likely anti-competitive effects in one of the three primary relevant markets – for port terminal services for Gateway cargo. This market accounted for approximately [20-30]% of the Parties' throughput at Kwai Tsing in 2018;[1]

    (b) the Alliance also gives rise to likely anti-competitive effects in related markets for the provision of overflow services to the operator of Container Terminal 3 ("**CT3**") (currently Goodman DP World Hong Kong Limited ("**DP World**") and the Parties' only competitor at Kwai Tsing) and in the provision of various services at Kwai Tsing to parties other than the shipping lines;

[1] For the purposes of this notice, throughput, volume and/or market share figures over which the Parties claim confidentiality have been replaced with ranges in square brackets.

(c) the Alliance is unlikely to give rise to anti-competitive effects in the remaining two primary relevant markets – for port terminal services for Barge Transshipment cargo and International Transshipment cargo. These two markets accounted together for approximately [70-80]% of the Parties' throughput at Kwai Tsing in 2018; and

(d) with respect to the markets in which the Alliance likely gives rise to anti-competitive effects, the Commission does not consider that the efficiency exclusion in section 1 of Schedule 1 to the Ordinance ("**Efficiency Exclusion**") applies to the Alliance. However, there are a number of efficiencies generated by the Alliance that may benefit, in particular, customers for Barge Transshipment and International Transshipment port terminal services.

5. Based on the above, the Commission has concerns that the Alliance could allow the Parties to (i) increase charges or, potentially, decrease service levels to shipping line customers in the Gateway market; (ii) increase charges related to Gateway services to parties other than shipping lines; and (iii) withhold overflow services to the operator of CT3 or provide them on less favourable terms.

Commitments proposed by the Parties

6. The Parties have offered commitments under section 60 of the Ordinance to take or refrain from particular actions ("**Proposed Commitments**"). The Proposed Commitments are appended as **Annex 1** to this notice.

7. In summary, the Parties propose to:

(a) cap their charges for services to shipping lines in respect of Gateway cargo, to the level applicable to each customer on 1 April 2019 (subject to indexation);

(b) provide a minimum service level for gate access to Kwai Tsing and the turnaround time for truck services at the port;

(c) cap their charges for services related to Gateway cargo to parties, other than shipping lines, to the level applicable on 1 April 2019 (subject to indexation);

(d) maintain reciprocal overflow arrangements with DP World on terms that are no less favourable to the operator of CT3 than as at 1 April 2019 (subject to indexation); and

(e) ensure that no MTL representatives appointed to serve on the Governing Committees of the Alliance are appointed as directors of the terminal operators of Chiwan or Shekou ports.

8. The Proposed Commitments would last for up to 8 years from their effective date, with the exception of the Proposed Commitment for service levels, which would last for the duration

of the Alliance. Compliance with the Proposed Commitments would be monitored by an independent Monitoring Trustee on behalf of the Commission.

9. The Commission considers that the Proposed Commitments are appropriate to address its concerns about a possible contravention of the First Conduct Rule and therefore proposes to accept them.

10. In accordance with the requirements of section 2, Schedule 2 to the Ordinance, the Commission hereby gives notice of the Proposed Commitments and requests interested parties to make representations in response to this notice (including on the Commission's proposed acceptance of the Proposed Commitments).

11. The remainder of the notice sets out further details regarding:

    (a) the relevant factual background, including regarding the Parties and the Alliance (Part II);

    (b) the competition concerns identified by the Commission (Part III);

    (c) the Proposed Commitments (Part IV and Annex 1); and

    (d) the manner in which interested parties should make representations in response to this notice (Part V).

II. RELEVANT FACTUAL BACKGROUND

The terminal operators at Kwai Tsing

12. The Parties are four of the five terminal operators at Kwai Tsing port in Hong Kong.

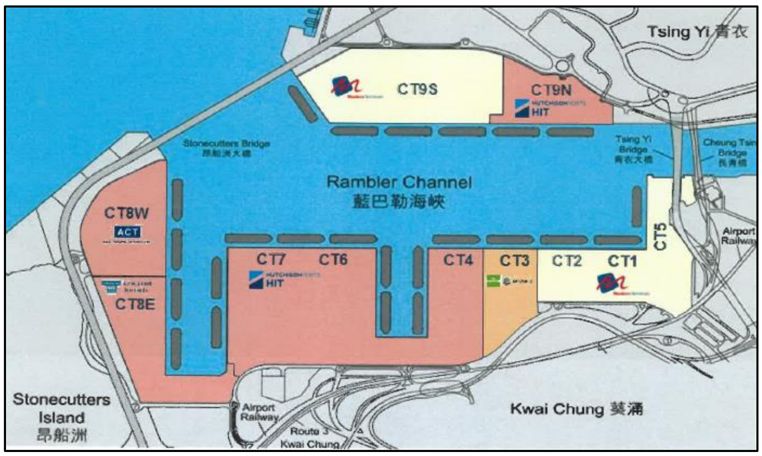
13. HIT is an indirect wholly owned subsidiary of Hutchison Port Holdings Trust ("**HPH Trust**"), which is listed on the Singapore Exchange.[2] CHT and ACT are also partly held by HPH Trust (which holds interests of 50% and 40% respectively), with COSCO SHIPPING Ports Limited holding the remaining interests. The operations of HIT, CHT and ACT are already co-managed by HIT, under a co-management agreement entered into by HIT, CHT and ACT in December 2016. In the Pearl River Delta ("**PRD**"), HPH Trust also holds a majority interest in the terminal operator at Yantian.

[2] HPH Trust's largest owner is CK Hutchison Holdings Limited ("**CKHH**"), which holds a 30.07% interest in HPH Trust. CKHH indirectly holds an 80% interest in Hutchison Port Holdings Limited ("**Hutchison Ports**") which is another global port terminal operator. Hutchison Ports has interests in certain small 'feeder' river or coastal ports in the PRD (along with HPH Trust), a minority interest in the operator of Port Klang and controlling interests in one of the (multiple) terminal operators at Busan and Gwangyang, Korea. Given the very low share of volumes which these interests would account for, they are not considered further in the Commission's competitive assessment in the relevant markets (see further Part III below).

14. MTL is under the indirect control of The Wharf (Holdings) Limited, which has a 68% interest in MTL.[3] In addition to its berths at Kwai Tsing, MTL owns a 65% interest in the terminal operator at DaChan Bay in Shenzhen. It also holds minority interests in terminal operators at two other ports in the PRD, namely 20% in the operator of Shekou and an 8% effective interest in the operator at Chiwan.

15. The remaining operator at Kwai Tsing DP World, which operates one berth at CT3 and is not a party to the Alliance.

Figure 1: terminal operators' berths at Kwai Tsing



The Alliance

16. On 8 January 2019, the Parties concluded the Hong Kong Seaport Joint Operating Alliance Agreement ("**JOAA**"), thereby establishing the Alliance. The term of the JOAA is until June 2047, unless terminated earlier.

17. Pursuant to the Alliance, the Parties jointly operate and manage their 23 berths across eight terminals at Kwai Tsing. Any activities or interests of the Parties in terminal operations elsewhere in the PRD or further afield do not come within the scope of the Alliance.

18. The Parties' cooperation under the Alliance involves:

    (a) *Operational coordination*, including pooling and sharing of all capacity and resources related to handling cargo, and joint planning and allocation of berthing space. This has allowed for the re-organisation of the Parties' terminals into three 'home berths', each serving the different 'alliances' to which their major shipping line customers belong (see **Figure 2** below);

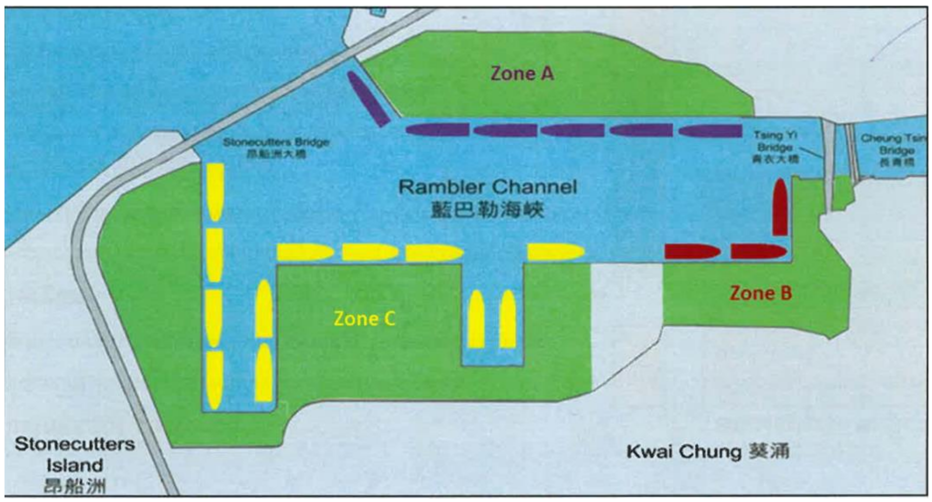
    (b) *Commercial coordination*, including the adoption of a joint approach and processes

[3] China Merchants Port Holdings Company Limited has a 27% interest, while the Jebsen Group holds the remaining 5% in MTL.

with respect to pricing, marketing strategy, commercial terms and customer allocation; and

(c) *Financial coordination*, involving sharing of operational profits and losses ('Adjusted EBITDA[4] Sharing') in respect of the Parties' joint operations between HIT (inclusive of ACT and CHT) and MTL in Kwai Tsing according to a pre-agreed split ratio.

Figure 2: berth re-allocation under the Alliance



19. Adjusted EBITDA Sharing and certain key aspects of operational coordination commenced on 1 April 2019, while remaining elements of envisaged cooperation are being implemented in phases.

20. The Parties have stated that this cooperation allows the Alliance to achieve 'terminal neutrality', which is a state of affairs in which each Party is indifferent as to which of the Parties' terminals a customer's vessel berths at and receives services from, as a result of the Parties' common financial incentives under the Alliance.

21. According to the JOAA, the objectives of the Alliance include improving the value proposition of the Hong Kong container port in Kwai Tsing in the context of growing regional competition, and jointly managing and operating the Parties' terminal operations in Kwai Tsing to maximise efficiencies to the benefit of customers and the industry at large.

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[4] EBITDA means earnings before interest, taxes, depreciation and amortization.

III. COMPETITION CONCERNS IDENTIFIED BY THE COMMISSION

22. This section explains the situation that the Proposed Commitments are seeking to deal with, for the purposes of section 2(2)(d) of Schedule 2 of the Ordinance.

Framework for assessment

23. The Alliance is a horizontal co-operation agreement between separate undertakings, and thus falls within the First Conduct Rule.[5]

24. The Commission's Guideline on the First Conduct Rule ("**FCR Guideline**") recognises that agreements of this nature, such as joint production agreements or joint selling agreements, can lead to various benefits. They may for example result in significant cost savings and synergies and/or economies of scale or scope, or improvements in product range or quality.[6]

25. Horizontal co-operation agreements may, however, also lead to competition concerns, for example where the parties to the agreement agree to fix prices or output or to share markets,[7] or if the co-operation enables the parties to the agreement to create, maintain or strengthen their market power.[8]

26. The Alliance is structured so that the Parties would contribute their respective capacity and assets to the Alliance, coordinate the services offered to their customers and share in the profit and loss of the Alliance's activities.

27. In the Commission's view, the Alliance may therefore be seen to have certain features in common with a joint production agreement, i.e. to the extent the Parties can be considered to jointly 'produce' and offer certain services (in this instance, port terminal services). The Alliance also has certain elements in common with mergers or 'merger like' joint ventures (for example alliances seen in the airline industry), in particular as regards the level of integration between the Parties and the potential restrictive effects of the Alliance on competition.

28. In light of the above, the Commission has assessed whether the Alliance has the effect of preventing, restricting or distorting competition in Hong Kong within the meaning of the

[5] For the avoidance of doubt, the Alliance is not excluded from the application of the First Conduct Rule by the 'mergers exclusion' in section 4, Schedule 1 to the Ordinance, as it does not amount to a merger within the meaning of section 3 of Schedule 7 to the Ordinance. Among other things, it does not involve an exchange of shares or assets, and does not amount to a 'full function' joint venture.

[6] FCR Guideline, paragraphs 6.100 (on joint production agreements) and 6.114 (on joint selling agreements).

[7] FCR Guideline, paragraphs 6.96 to 6.99 (joint production agreements) and 6.109 to 6.112 (joint selling agreements).

[8] FCR Guideline, paragraph 3.20.

First Conduct Rule.[9] When assessing whether an agreement has an anti-competitive effect, the Commission may consider not only any actual effects but also effects that are *likely* to flow from the agreement.[10]

29. The Commission has also had regard to the efficiencies claimed by the Parties in respect of the Alliance, and for those markets where anti-competitive effects may arise, considered whether those efficiencies satisfy the conditions of the Efficiency Exclusion in the Ordinance.

Assessment of effects

Relevant market definition

30. When assessing the actual or likely anti-competitive effects of an agreement, the Commission will consider the extent to which the undertakings concerned have market power in a relevant market. The exercise of defining the relevant market assists in identifying in a systematic way the competitive constraints that undertakings face when operating in a market.[11]

31. In this case, the Commission's investigation into the effects of the Alliance has focused on the Parties' primary activity, i.e. the provision of port terminal services for containerised cargo to shipping lines ("**Relevant Services**").[12] The Relevant Services involve the loading and unloading of shipping containers to and from vessels (which may arrive at Kwai Tsing via other types of vessels, barges and trucks), landside handling ('stevedoring') and the storage of the containers in the yards between movements.

Product market definition

32. The Commission has found three primary product markets in which the Parties provide Relevant Services through the Alliance and on which the effects of the Alliance should be assessed, as follows:

    (a) *International Transshipment market*, involving the handling of cargo that arrives at a port by oceangoing vessel or a shortsea feeder vessel and is moved (or

[9] The Commission reserves its position as to whether arrangements of this kind could, depending on the relevant circumstances, be analysed as having the object of preventing, restricting or distorting competition.

[10] See in this respect the FCR Guideline, paragraph 3.17.

[11] FCR Guideline, paragraph 3.21. The Commission's Guideline on the Second Conduct Rule sets out the Commission's approach to market definition in further detail.

[12] The Relevant Services accounted for the vast majority of the Parties' total revenues in 2018. While the Parties are also active in the provision of other services, such as in respect of bulk and automotive cargo, the Commission's investigation has not revealed a need to consider those services in detail.

'transshipped') at the port to another oceangoing or shortsea feeder vessel, destined for onward transportation to other ports.

(b) *Barge Transshipment market*, involving the handling of cargo that is transhipped at Kwai Tsing between a barge or lighter vessels which sail on rivers and in coastal areas and an oceangoing vessel, for onward transportation to and from the hinterland.

(c) *Gateway market*, involving the handling of cargo that arrives at Kwai Tsing by truck and departs by oceangoing vessel or arrives at Kwai Tsing by oceangoing vessel and departs by truck, for onward transportation to and from the hinterland.

33. The Commission has found that these Relevant Services fall into distinct product markets on the basis that:

(a) pricing, operating margins and price correlations suggest that the competitive conditions differ across the three categories of Relevant Services;

(b) there are potentially considerable differences in transit times associated with Gateway and Barge Transshipment cargo, with significant differences in prices for the Relevant Services for these two types of cargo; and

(c) Relevant Services for Gateway cargo entail additional operations (for example, at the Gatehouse) compared to Relevant Services for Barge Transshipment and International Transshipment cargo.

Geographic market definition

International Transshipment market

34. The Commission's investigation has found that this market is wide in geographic scope. A map of the major ports in East Asia is at **Figure 3** below. Of these ports, the Commission's investigation confirms that at least Busan, Shenzhen, Kaohsiung, Port Klang, Tanjung Pelepas and Singapore are in the same geographic market as Kwai Tsing for Relevant Services for International Transshipment.

35. This is on the basis of: (i) the views of shipping lines contacted by the Commission, which suggest these other ports are substitutable with Kwai Tsing for International Transshipment cargo; (ii) the views expressed in third party industry reports, which contain a similar suggestion; and (iii) throughput, price and margin trends at Kwai Tsing, which suggest significant competitive pressure from outside Kwai Tsing.

36. The Commission has not defined the exact scope of this geographic market since, as outlined below, the Parties would not obtain a position giving rise to competition concerns under any plausible definition.

Figure 3: major ports in East Asia

Barge Transshipment market

37. The Commission's investigation has found that this market is relatively wide in geographic scope. A map of major ports in the PRD (along with relevant ownership interests) is at **Figure 4** below. Of these ports, the Commission's investigation confirms that at least Nansha, Shekou, Chiwan, Yantian and DaChan Bay are in the same geographic market as Kwai Tsing for Relevant Services for Barge Transshipment.

38. This is on the basis of: (i) the views of shipping lines contacted by the Commission; (ii) the functional substitutability of PRD ports with Kwai Tsing for Barge Transshipment; (iii) the Parties' internal documents, which suggest they regard the relevant ports as sources of competition; and (iv) throughput, price and margin trends at Kwai Tsing.

Figure 4: ports/terminal operators in the PRD

Gateway market

39. The Commission's investigation has found that this market is narrow in geographic scope and appears to be limited to Kwai Tsing.

40. This is on the basis of the following:

(a) for cargo that is in whole or in part originating from or destined for Hong Kong, other ports are disadvantaged relative to Kwai Tsing by reason of their geographic distance from Hong Kong, the required border crossing and customs procedures;

(b) Kwai Tsing has several features that make it particularly appealing for shippers of time-sensitive goods, such as fresh fruit and refrigerated (or 'reefer') cargo, including shippers based outside of Hong Kong, which include its efficiency, connectivity and regulations for particular types of cargo; and

(c) the price and margin trends at Kwai Tsing suggest limited competitive pressure on the Parties from outside Kwai Tsing.

Effects in the relevant markets

International Transshipment

41. According to the Commission's investigation, the Alliance is unlikely to give rise to anti-competitive effects in the International Transshipment market. This market accounted for approximately [30-40]% of the Parties' combined throughput at Kwai Tsing in 2018.

42. Based on 2018 data, the market shares in this market are as follows:[13]

Port / Terminal Operator	2018 Throughput (million TEU)	Market Share
Singapore	31.6	42.9%
Busan	11.4	15.5%
Tanjung Pelepas	8.4	11.4%
Port Klang	7.6	10.3%
Kaohsiung	4.9	6.7%
Shenzhen (Shekou, Yantian, Chiwan and DaChan Bay)[14]	3.5	4.8%
DP World	0.1	0.1%
Alliance	*6.1*	*8.3%*
Total	**73.6**	**100%**

43. The Commission's investigation has found that:

    (a) the Parties' combined market share under the Alliance is not at a level giving rise to concerns in this market (i.e., approximately 8.3% in 2018);

    (b) the Parties' shipping line customers can and do switch to alternative suppliers in East Asia with respect to International Transshipment cargo;

    (c) several of those suppliers have significant expansion plans underway; and

    (d) as such, the Parties are and will continue to be subject to effective competitive constraint from outside the Alliance.

[13] The market shares have been compiled based on data from Drewry "Container Forecaster & Annual Review 2019/20, Quarter 3, October 2019" and the Busan Port Authority, and estimates based on public sources.

[14] Although the Parties have controlling ownership interests in certain of these ports (Yantian and DaChan Bay), even if the entirety of the Shenzhen volumes were accounted for by those ports and added to the Parties' market share in Kwai Tsing, the Parties' combined share would remain below a level which would cause concern (i.e., under approximately 13%).

Barge Transshipment

44. According to the Commission's investigation, the Alliance is unlikely to give rise to anti-competitive effects in the Barge Transshipment market. This market accounted for approximately [30-40]% of the Parties' throughput at Kwai Tsing in 2018.

45. Based on 2018 data, the market shares in this market are as follows:[15]

Port / Terminal Operator	**2018 Throughput (million TEU)**	**Market Share**
Nansha	10.2	[40-50]%
Shekou	2.4	[10-20]%
Chiwan	2.3	[10-20]%
Yantian	2.1	[5-10]%
DaChan Bay	0.1	[0-5]%
DP World	0.1	[0-5]%
Alliance	*[6-10]*	*[20-30]%*
Total	**[20-25]**	**100%**

46. The Commission's investigation has found that:

(a) Nansha is particularly likely to exercise effective competitive constraint on the Parties, given its leading position in the market and since it has significant expansion projects in place as well as Government subsidies to attract customers;

(b) Shekou and Chiwan, which are operated as a single port group by China Merchants Port Holdings Company Limited, also offer an extensive barge network and services in competition to the Parties and have also seen significant recent investments;

(c) the Parties' shipping line customers can and do switch to alternative suppliers in the PRD with respect to Barge Transshipment cargo;

(d) the Parties' prices and margins in the Barge Transshipment market suggest that they are subject to effective competitive pressure;

[15] The market shares have been compiled based on data published by the China Ports and Harbours Association for 2018 ("Throughput for Intermodal Transportation of the Container Terminals of Hub Port in China" (《中國樞紐港集裝箱碼頭多式聯運吞吐量快報》) and transactional data from the Parties.

(e) when viewed together with the preceding factors, the Parties' combined market share under the Alliance is not at a level giving rise to concerns in this market (i.e., approximately [20-30]% in 2018);[16] and

(f) as such, the Parties are and will continue to be subject to effective competitive constraint from outside the Alliance.

Gateway market

47. The Commission has found that the Alliance is likely to give rise to anti-competitive effects in the Gateway market. This market accounted for approximately [20-30]% of the Parties' throughput at Kwai Tsing in 2018.

48. The Commission's investigation has found that:

(a) the Alliance eliminates competition between HIT and MTL, which are the largest players and each other's closest competitors in Kwai Tsing;

(b) the Alliance brings approximately [90-100]% of Kwai Tsing's throughput in the Gateway market under the operation of the Alliance based on 2018 data;

(c) DP World, as the only other operator at Kwai Tsing, has limited capacity to operate as an alternative for the Parties' customers; and

(d) while it appears there is a subset of customers using Kwai Tsing for Gateway cargo for which terminal operators at PRD ports may constitute substitutes, the Commission's investigation suggests that these 'marginal customers' are unlikely to be sufficient in number to constrain a potential price increase by the Parties in the Gateway market.

49. In the absence of effective competitive constraint on the Parties in this market, the Commission is concerned that the Alliance may permit the Parties to profitably increase charges and/or decrease service levels vis-à-vis their customers.

[16] The Commission considers that Yantian and DaChan Bay are unlikely to exercise any competitive constraint on the Parties since the Parties' associated companies have majority interests in the terminal operators at those ports. If the entirety of the Yantian and DaChan Bay volumes were added to the Parties' market share in Kwai Tsing, the Parties' combined share would be [30-40]%. However, the Commission has found that the other PRD ports (particularly Nansha, Chiwan and Shekou which together accounted for [60-70]% of the market) will still exercise significant competitive constraint on the Parties in this market, so as to prevent anti-competitive effects arising.

Effects in related markets

50. The Commission has also found that the Alliance is likely to give rise to anti-competitive effects in certain related markets, outlined below.

Provision of overflow services to the operator of CT3 (currently DP World)

51. Overflow arrangements involve a terminal operator requesting another to allow their customer's vessel to berth at that second operator, typically where there is a lack of capacity at the first operator's berths.[17] Access to another party's berthing slots is not guaranteed and is usually granted by the other party on a case-by-case basis. DP World has concluded overflow arrangements with HIT, CHT and MTL at Kwai Tsing.

52. The Commission's investigation has found that there is a risk that the Parties would be incentivised to reduce the provision of such services to the operator of CT3, particularly vessel overflow services, as a result of the Alliance. This would foreclose the operator of CT3 from accessing an important input.

Provision of services related to Gateway cargo to other counterparties

53. While the Parties provide services primarily to shipping lines, they also provide certain services to other counterparties, for which a charge is imposed ("**Other CP** [Counterparty] **Charges**"). An example is the Port Security Charge, which is levied on shippers and truckers directly for use of the secure cargo areas at Kwai Tsing.

54. In light of the consolidation of the Parties' market power with respect to Gateway cargo, the Commission has concerns that the Alliance may permit the Parties to profitably increase Other CP Charges at Kwai Tsing.

Efficiencies

55. The Commission's investigation has found that the Alliance may allow the Parties' shipping line customers to enjoy certain of the efficiencies claimed by the Parties, such as:

    (a) reductions in inter-terminal trucking trips, as a result of joint berth planning by the Parties;

    (b) more efficient movements of containers in the yard, as a result of joint use and planning of yard space; and

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[17] This type of overflow arrangement is known as 'vessel' overflow. Another type is 'container' overflow, whereby one terminal operator handles the cargo of another terminal operator's customer in return for a fee (for example, in the context of a transshipment operator). The Commission's concerns arise primarily in respect of vessel overflow, though container overflow is also covered in the existing overflow agreements with DP World.

(c) reduction in fuel use from shorter vessel waiting times, due to joint berth planning and the ability of the Parties to use each other's berths to avoid congestion.

56. However, for these efficiencies to exclude the Alliance from the application of the First Conduct Rule for the purposes of the Efficiency Exclusion, they would need to satisfy the four conditions of the exclusion.[18]

57. The Commission does not consider that the Alliance would satisfy the Efficiency Exclusion. For example, given the extent of the anti-competitive effects identified in the Gateway market, the Commission is concerned that the Alliance could afford the Parties the possibility of eliminating competition in respect of a substantial part of goods and services, and thus fail to meet the fourth condition of the Efficiency Exclusion. As noted in the FCR Guideline, this condition recognises that protecting the competitive process takes priority over the potential efficiency gains which might result from a particular agreement.[19]

58. While the Alliance therefore does not meet the conditions of the Efficiency Exclusion, the Commission acknowledges that certain of the claimed efficiencies as referred to in paragraph 55 could benefit shipping line customers in, particularly, the International Transshipment and Barge Transshipment markets.

IV. PROPOSED COMMITMENTS

59. This section provides a high level summary of the Proposed Commitments appended in **Annex 1** and explains their intended object and effect for the purposes of section 2(2)(b) of Schedule 2 of the Ordinance.

Relevant legal framework

60. Under section 60 of the Ordinance, the Commission may accept a commitment from a person to: (a) take any action, or (b) refrain from taking any action, where it considers this appropriate to address its concerns about a possible contravention of a competition rule.

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[18] The Efficiency Exclusion applies where the relevant agreement:

"*(a) contributes to–*

(i) improving production or distribution; or

(ii) promoting technical or economic progress [first condition],

while allowing consumers a fair share of the resulting benefit [second condition];

(b) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated in paragraph (a) [third condition]; and

(c) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question [fourth condition]".

[19] FCR Guideline, Annex, paragraph 2.18.

61. If the Commission accepts commitments, it will terminate its investigation and not bring proceedings in the Competition Tribunal regarding the matters covered by the commitments. This is subject, however, to the ability of the Commission to withdraw its acceptance of commitments under the circumstances provided for in section 61 of the Ordinance, including where there has been a material change of circumstances or the person giving the commitment has failed to comply with them. The Ordinance does not require parties offering commitments to make any admission of a contravention.

62. In terms of procedure, Schedule 2 of the Ordinance requires the Commission to consult on proposed commitments before it accepts them and consider any representations received on the proposed commitments. If the Commission accepts the commitments following this consultation, under section 64 of the Ordinance, it is required to register the commitments on its Register of Commitments.

63. Should the Commission accept the Proposed Commitments, it will not continue its investigation, or bring proceedings in the Tribunal, against the Parties regarding this matter.

Summary of Proposed Commitments

64. The purpose of the Proposed Commitments is to prevent the Alliance from giving rise to anti-competitive effects in the Gateway market and related markets (see further paragraphs 47 to 54 above), while allowing customers to benefit from the efficiencies created by the Alliance (paragraphs 55 to 58 above).

Cap on Gateway cargo handling charges (paragraph 7)

65. The Commission is concerned that the Parties may be able to raise their charges to shipping lines with respect to Relevant Services for Gateway cargo at Kwai Tsing, because as noted above the Parties enjoy a high degree of market power in this market under the Alliance.

66. In paragraph 7 of the Proposed Commitments, the Parties propose to cap cargo handling rates in the Gateway market (referred to as “Container Charges for Gate Traffic” in the Proposed Commitments) in each of their shipping line customers’ contracts at levels that existed as at the “Reference Date” of 1 April 2019 (subject to the indexation mechanism described below). As noted, 1 April 2019 is the date on which key provisions of the Alliance entered into force.

67. The following can be noted in respect of the cap:

    (a) The cap will apply on a per charge item and per unit basis. This aims to ensure that the charge for each separate Gateway service provided by the Parties to the customer (for example, in respect of containerized cargo of different sizes, refrigerated cargo, and/or hazardous goods cargo) should not increase.

(b) The cap will reflect any rebates or discounts available to the customer pursuant to rebate or discount schemes in place as at 1 April 2019 (assuming the customer continues to qualify for such schemes, for example based on their volumes of cargo).

(c) The Parties and their customers remain free to negotiate lower charges or additional discounts or rebates compared to those at 1 April 2019, while customers also retain the flexibility to request higher charges (for example, in order to purchase more premium or priority services in relation to Gateway cargo).

68. The Commission considers that the proposed cap restricts the Parties' ability to raise their Gateway cargo handling charges, while retaining sufficient flexibility for the shipping lines to negotiate different levels of charges with the Parties from those in force on 1 April 2019. It thus appropriately addresses the competition concern in this market.

Services levels in the Gateway market (paragraph 8)

69. The Commission considers that, in theory, the Parties could exercise their market power in the Gateway market not only by increasing charges, but also by decreasing service levels.

70. In paragraph 8 of the Proposed Commitments, the Parties propose to commit to certain service levels related to Gateway cargo, subject to customary *force majeure* clauses. This involves maintaining gate access to their terminals 24 hours per day throughout the year, maintaining a monthly average "External Truck Turnaround Time" of not more than 60 minutes,[20] and publishing information about both metrics.

71. The Commission considers that this Proposed Commitment addresses the potential concern as to decreased service levels in the Gateway market. It notes that "External Truck Turnaround Time" is a metric utilised in several ports globally to measure efficiency.

Cap on Other CP Charges (paragraphs 9 and 10)

72. As noted above, the Commission is concerned that the Parties may be able to raise charges, or introduce new charges, in the Gateway market to customers other than shipping lines such as shippers or truckers (i.e., Other CP Charges) as a result of the consolidation of their market power under the Alliance. This would be the case for those Other CP Charges where the Parties, DP World and/or OnePort[21] are the only suppliers of the service in question and do not offer a free alternative.

[20] That is, the time it takes for an external truck to enter the gate, complete all operations required for the collection or drop-off of a container, and to exit the gate.

[21] OnePort is a joint venture between terminal operators at Kwai Tsing which is jointly controlled by HPH Trust and MTL, aimed at developing electronic services for users of the port. It handles the Port Security Charge and various Other CP Charges.

73. In paragraphs 9 and 10 of the Proposed Commitments, the Parties propose caps in relation to those Other CP Charges where the Parties, DP World and/or OnePort are the only suppliers of the service in question and do not offer a free alternative (referred to as charges for "Gate Traffic-Related Services" in the Proposed Commitments), as follows and subject to indexation:

(a) to cap charges for existing and qualifying Gate Traffic-Related Services (which would include the Port Security Charge) to levels that existed as at 1 April 2019;

(b) for existing services that do not qualify as Gate Traffic-Related Services as at the effective date of the Proposed Commitments ("**Effective Date**"), but so qualify after the Effective Date, to cap the total annual value of charges to HK$20 million in any given year;[22]

(c) to cap the total annual value of charges for future Gate Traffic-Related Services (that do not yet exist as at the Effective Date) to HK$30 million in any given year; and

(d) to cap the combined value of the charges subject to caps at points (b) and (c) above to HK$45 million in any given year.

74. The Commission considers that the Proposed Commitment addresses the competition concern, and should prevent the Parties from increasing revenue from Other CP Charges to compensate for the restriction on increasing Gateway cargo handling charges. For example, the cap of HK$45 million on the charges in points (b) and (c) above would amount to only approximately [0-2]% of the Parties' revenues for Gateway cargo handling charges. At the same time, the commitment should permit the Parties to introduce additional Gate Traffic-Related Services, without fear that they would not be able to recover the costs of such services.

Provision of overflow services to the Operator of CT3 (currently DP World) (paragraph 11)

75. To address the Commission's concern around the provision of overflow services to CT3, the Parties propose to maintain reciprocal arrangements between the Parties and the operator of CT3 (currently DP World) on terms and conditions no less favourable to the latter than those applicable as at 1 April 2019, unless otherwise requested by the operator of CT3 and subject to indexation. This is provided for in paragraph 11 of the Proposed Commitments.

76. The Commission considers that the Proposed Commitment ensures that the Parties are not able to unilaterally raise charges for overflow services or otherwise foreclose the access of the operator of CT3 to overflow services.

[22] This could include the charge levied by OnePort for the electronic Release Order for import containers ('eRO'), for which a free paper-based alternative is currently available but is intended to be phased out in the future.

Cross-directorships with the ports of Chiwan and Shekou (paragraph 12)

77. In its assessment of the Barge Transshipment market, the Commission considered that the ports of Chiwan and Shekou are likely to exercise effective competitive constraint on the Alliance,[23] albeit that that constraint would be somewhat softened because MTL holds minority stakes in the terminal operators at these ports. It notes, however, that MTL also appoints directors to the boards of these operators and the current two MTL appointees also hold management positions within the Alliance.

78. To avoid concerns around the exchange of competitively sensitive information, particularly given the importance of Chiwan and Shekou as competitors to the Alliance in the Barge Transshipment market, MTL proposes to ensure that no MTL representatives appointed to serve on the Governing Committees of the Alliance are appointed as directors of Chiwan or Shekou (see paragraph 12 of the Proposed Commitments).

79. The Commission considers that this Proposed Commitment addresses the potential competition concern around anti-competitive information flows between the Alliance and the operators of Chiwan and Shekou.

Indexation (paragraph 13)

80. The Parties propose a mechanism for indexation in respect of the caps on Gateway cargo handling charges, Other CP Charges and charges for overflow services with the operator of CT3. According to paragraph 13 of the Proposed Commitments, when the upward changes in the annual Consumer Price Index A ("**CPI(A)**") in the period since 1 April 2019 cumulatively exceed a threshold of 5.5%, the Parties will be permitted to adjust the individual caps upwards to the level of the cumulative change. Thereafter, they will be permitted to adjust the individual caps upwards by the level of the annual CPI(A) change.

81. The Commission considers that the proposed mechanism for indexation is appropriate. Without such a mechanism, the caps could effectively require the Parties to decrease their charges in real terms. That is, because of inflation in the economy, the same level of charges would effectively have a decreased value over time. The threshold of 5.5% ensures that the Parties cannot attempt to increase charges as soon as the Proposed Commitments become effective. As for the use of CPI(A), this is the index most widely used by the Parties and their customers.

Duration, release and variations of the Proposed Commitments (paragraphs 14 to 17)

82. In terms of duration, the Parties propose that:

    (a) the Proposed Commitment on service levels would remain in place for the duration of the Alliance, unless otherwise agreed by the Commission (paragraph 15); and

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[23] See also footnote 16 above.

(b) the other Proposed Commitments (on Gateway cargo handling charges, Other CP Charges, overflow services to the Operator of CT3 and cross-directorships) would remain for a term of eight years commencing on the Effective Date or for the duration of the Alliance, whichever is shorter (paragraph 14).

83. With regard to the Proposed Commitments in point (b) above, the Parties may also make a reasoned request to the Commission within five years from the Effective Date to review the Proposed Commitments with a view to varying, substituting or releasing the Proposed Commitments under section 62 of the Ordinance. If the Commission does not review the Proposed Commitments and explain to the Parties whether or not it proposes to vary, substitute or release them, the Proposed Commitments would lapse after five years from the Effective Date.

84. The Parties also retain a general right to request a review of the Proposed Commitments and commit themselves to assisting the Commission in such reviews (paragraphs 16 and 17).

85. According to the Commission's investigation, there is some evidence that other ports in the PRD will expand and improve their efficiency in handling Gateway cargo in the coming years, meaning that the Parties may be subject to more significant competitive constraint in the Gateway market from outside Kwai Tsing, in turn lessening the need for the Proposed Commitments. However, the available evidence is unclear as to the imminence and extent of these developments. In the circumstances, the Commission considers that the proposed duration of eight years or the duration of the Alliance (as the case may be) to be appropriate, while the review mechanism will allow the Commission to provide an earlier release from the Proposed Commitments if developments (for example, at the PRD ports) so warrant.

Reporting, compliance and monitoring of the Proposed Commitments (paragraphs 18 to 40)

86. The Parties propose the following reporting and monitoring mechanism in order to ensure compliance with the Proposed Commitments:

(a) The Parties will appoint an independent Monitoring Trustee that is approved by the Commission. The Monitoring Trustee is to be remunerated by the Parties, but will act for the sole benefit of the Commission (see paragraphs 22 to 27).

(b) In terms of reporting, HIT (on behalf of HIT, CHT and ACT) and MTL shall:

i. within two months of the Monitoring Trustee's appointment, submit an Initial Baseline Report to the Commission, which will contain various information to be used in verifying compliance with the Proposed Commitments in the future, including the proposed methodology for assessing compliance with the substantive Proposed Commitments; and

ii. on an annual basis, six months following the Parties' financial year, provide to the Commission an Annual Compliance Report detailing their compliance with the Proposed Commitments, with supporting information and evidence (paragraphs 18, 20, 21).

(c) The Monitoring Trustee shall verify the Initial Baseline Report and Annual Compliance Reports by way of written report to the Commission, which shall among other things confirm the accuracy of the Parties' compliance assessment and identify any failure to comply with the Proposed Commitments (paragraph 32).

(d) Should the Monitoring Trustee identify shortcomings in the Initial Baseline Report or Annual Compliance Reports (for example, in terms of the methodology, information or evidence used), the Parties may be required by the Commission to submit a revised report addressing the shortcomings (paragraph 19).

(e) In addition to this, the Monitoring Trustee may at any time propose measures to the Parties to ensure their compliance with the Proposed Commitments, receive concerns raised by customers regarding the Parties' compliance with the Proposed Commitments, and report to the Commission where the Commission suspects the Parties to have failed to comply with the Proposed Commitments (paragraph 34).

(f) To facilitate the monitoring, the Parties shall provide the Monitoring Trustee with such information, documents and assistance as the Monitoring Trustee requires to carry out its monitoring functions, and provide the Commission with such information or documents that the Commission may request to verify compliance (paragraphs 37 and 38).

(g) Finally, the Parties will inform their customers and the operator of CT3 of the existence of the Proposed Commitments and the Monitoring Trustee's details (paragraph 40). This will enable customers of the Parties and the operator of CT3 to bring potential instances of non-compliance to the attention of the Monitoring Trustee.

87. The Commission considers the measures as described above to be suitable to ensure that the Parties' compliance with the Proposed Commitments can be monitored in an effective, thorough and ongoing manner.

Other matters

88. The Proposed Commitments do not constitute an admission by the Parties of a contravention of a competition rule (see paragraph 2 of the Proposed Commitments).

89. In accordance with section 60 of the Ordinance, should the Proposed Commitments be accepted by the Commission, the Commission will not continue its investigation, or bring proceedings in the Tribunal, with regard to the Alliance insofar as the matters addressed in the Proposed Commitments are concerned.

V. MAKING REPRESENTATIONS IN RESPONSE TO THIS NOTICE

90. The Commission invites representations from interested parties on the matters in this notice, including the Commission's proposed acceptance of the Proposed Commitments. The Commission will consider all representations received within the deadline below before making its decision on whether to accept the Proposed Commitments.

91. Any party wishing to provide representations should do so in writing **no later than by 6pm on 26 August 2020**. **Representations received after this time will not be considered.**

92. Representations should be sent to the Commission as follows:

    (a) by email (preferred) to Consultation@compcomm.hk, with the case reference number EC/03AY quoted in the subject line of the email;

    (b) by fax to +852 2522 4997; or

    (c) by post to:

    Representations on Case EC/03AY
    Competition Commission
    19/F South Island Place
    8 Wong Chuk Hang Road
    Wong Chuk Hang.

93. The Commission will publish the representations received on its website.

94. If a party would like to claim confidentiality over some or all of their representations, they should identify the relevant material and set out reasons why the identified material is, in their opinion, confidential pursuant to section 123(2) of the Ordinance. They should also provide a non-confidential version for publication purposes, from which all confidential information has been redacted.

競爭事務委員會
COMPETITION COMMISSION

ANNEX 1

PROPOSED COMMITMENTS (ATTACHED SEPARATELY)