

**CASE EC/03AY**

**NOTICE REGARDING THE COMMISSION'S ACCEPTANCE OF  
COMMITMENTS IN THE HONG KONG SEAPORT ALLIANCE CASE**

***30 OCTOBER 2020***

## TABLE OF CONTENTS

<b>I. INTRODUCTION AND EXECUTIVE SUMMARY .....</b>	<b>4</b>
THE COMMISSION'S INVESTIGATION.....	4
THE ORIGINAL COMMITMENTS .....	5
THE REVISED COMMITMENTS .....	6
<b>II. RELEVANT FACTUAL BACKGROUND.....</b>	<b>7</b>
THE TERMINAL OPERATORS AT KWAI TSING .....	7
THE ALLIANCE .....	9
<b>III. COMPETITION CONCERNS IDENTIFIED BY THE COMMISSION .....</b>	<b>10</b>
FRAMEWORK FOR ASSESSMENT.....	10
ASSESSMENT OF EFFECTS .....	11
<i>Relevant market definition.....</i>	<i>11</i>
Product market definition .....	12
Geographic market definition .....	13
International Transshipment market.....	13
Barge Transshipment market .....	14
Gateway market .....	15
<i>Effects in the relevant markets .....</i>	<i>16</i>
International Transshipment market.....	16
Barge Transshipment market .....	17
Gateway market .....	18
<i>Effects in related markets .....</i>	<i>19</i>
Provision of overflow services to the operator of CT3 (currently DP World) .....	19
Provision of services related to Gateway cargo to other counterparties .....	19
EFFICIENCIES .....	20
<i>Efficiencies claimed by the Parties .....</i>	<i>20</i>
<i>Assessment under the Efficiency Exclusion .....</i>	<i>21</i>
<b>IV. THE REVISED COMMITMENTS .....</b>	<b>22</b>
RELEVANT LEGAL FRAMEWORK.....	22
<i>Generally.....</i>	<i>22</i>
<i>Failure to comply.....</i>	<i>23</i>
SUMMARY OF THE REVISED COMMITMENTS .....	23
<i>Recitals.....</i>	<i>23</i>
<i>Cap on Gateway cargo handling charges .....</i>	<i>24</i>
<i>Services levels for Gateway cargo.....</i>	<i>25</i>
<i>Cap on Other CP Charges .....</i>	<i>25</i>
<i>Provision of overflow services to the Operator of CT3 (currently DP World) .....</i>	<i>26</i>
<i>Cross-directorships with CCT and SCT .....</i>	<i>27</i>
<i>Indexation .....</i>	<i>27</i>
<i>Duration, release and variations of the Revised Commitments .....</i>	<i>28</i>
<i>Reporting, compliance and monitoring of the Revised Commitments.....</i>	<i>29</i>
IMPLEMENTATION AND EFFECT OF THE REVISED COMMITMENTS.....	30

<b>V.</b>	<b>REPRESENTATIONS RECEIVED ON THE ORIGINAL COMMITMENTS .....</b>	<b>30</b>
	SUMMARY OF ISSUES RAISED ON THE ORIGINAL COMMITMENTS.....	31
	<i>Cap on Gateway cargo handling charges .....</i>	<i>31</i>
	<i>Service levels for Gateway cargo .....</i>	<i>32</i>
	<i>Cap on Other CP Charges .....</i>	<i>32</i>
	<i>Indexation .....</i>	<i>32</i>
	<i>Duration of commitments related to pricing and overflow arrangements.....</i>	<i>33</i>
	<i>Duration of commitments related to MTL's directorships at CCT and SCT .....</i>	<i>33</i>
	SUMMARY OF OTHER POINTS RAISED .....	34
	<i>Concerns on the International Transshipment market .....</i>	<i>34</i>
	<i>Pass-on of efficiencies to customers .....</i>	<i>34</i>
	<i>Financial and commercial coordination .....</i>	<i>35</i>
	<i>Miscellaneous comments.....</i>	<i>35</i>
<b>VI.</b>	<b>COMMISSION ACCEPTANCE OF THE REVISED COMMITMENTS .....</b>	<b>36</b>

## 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 Hong Kong Seaport Joint Operating Alliance Agreement ("**JOAA**"), which establishes 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 JOAA, 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. 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 is likely to give rise to 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;<sup>1</sup>
  - (b) the Alliance is also likely to give rise to anti-competitive effects in related markets for:
    - i. 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
    - ii. the provision of various services related to Gateway cargo to parties other than the shipping lines;

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<sup>1</sup> 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. It also has a concern around the potential exchange of competitively sensitive information between MTL and the port operators of Chiwan and Shekou ports, Chiwan Container Terminal Co. Limited (“**CCT**”) and Mega Shekou Container Terminals Limited (“**SCT**”), as a result of cross-directorships.

### The Original Commitments

6. On 30 June 2020, the Parties offered a set of commitments under section 60 of the Ordinance in order to address the Commission’s concerns (“**Original Commitments**”),<sup>2</sup> whereby they would:
- (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 (“**Reference Date**”), 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 certain existing services related to Gateway cargo to parties other than shipping lines to the level applicable on the Reference Date, and to cap the charges for any such services falling within scope of the commitment after the effective date of the commitments (“**Effective Date**”) to the total annual value of

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<sup>2</sup> The Original Commitments and the Revised Commitments (see further below) have been offered by HPHT Limited on behalf of HIT, ACT and CHT on the one hand, and MTL on the other hand. Where the commitments are concerned, references to the Parties should be understood to refer as such.

\$45 million, in both cases 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 the Reference Date, 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 CCT or SCT.
7. The Original Commitments were to last for up to 8 years from the Effective Date, with the exception of the commitment for service levels, which was to last for the duration of the Alliance. Compliance with the Original Commitments was to be monitored by an independent Monitoring Trustee on behalf of the Commission.
8. In accordance with the requirements of section 2, Schedule 2 to the Ordinance, on 12 August 2020, the Commission gave notice of the Original Commitments, including its proposal to accept the commitments, and requested interested parties to make representations by 26 August 2020.<sup>3</sup>
9. The Commission received nine representations on the Original Commitments by the deadline of 26 August 2020, which have been published on its website and are also summarised in Part V below.

### The Revised Commitments

10. After careful consideration of the representations received, the Commission engaged with the Parties to secure five modifications to the Original Commitments, which it considered necessary in light of the concerns raised in the consultation. The Original Commitments as so modified are referred to as the “**Revised Commitments**”. The modifications are to:
- (a) clarify that the cap on Gateway cargo handling charges does not affect the validity of any more favourable pricing arrangements agreed *after the Reference Date*;
  - (b) clarify that this cap also applies to charges for inter-terminal trucking (“**ITT**”) services;
  - (c) extend the scope of the commitment in respect of service levels to ensure that any contractual provisions regarding operational productivity levels specific to Gateway

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<sup>3</sup> See the Commission’s *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)*, which is available on its website.

cargo which may be stipulated in an individual shipping line customer's contract are no less favourable than any in force as at the Reference Date;

- (d) extend the duration of MTL's commitment in respect of cross-directorships at CCT and SCT to the lifetime of the Alliance; and
  - (e) provide an explicit reference to the plans and mechanisms adopted by the Parties under the JOAA to ensure customers receive a fair share of the efficiencies anticipated by the Alliance.
11. With these modifications, the Commission considers that the Revised Commitments are appropriate to address its concerns about a possible contravention of the First Conduct Rule and has decided to accept the Revised Commitments under section 60 of the Ordinance.
12. Under section 60(6) and Schedule 2, section 4 of the Ordinance, where the Commission accepts a commitment, it must as soon as practicable afterwards give notice in writing of that decision to the person who made the commitment, register the commitment on the Register of Commitments, and publish the commitment through the Internet or in any other manner the Commission considers appropriate.
13. Accordingly, the Commission issues the present notice to give notice of, and explain its decision regarding, the acceptance of the Revised Commitments. The Revised Commitments are also published today in the Register of Commitments, which is available on the Commission's website and at its offices during ordinary business hours.
14. The remainder of this 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 Revised Commitments (Part IV);
  - (d) the representations received on the Original Commitments (Part V); and
  - (e) the Commission's acceptance of the Revised Commitments (Part VI).

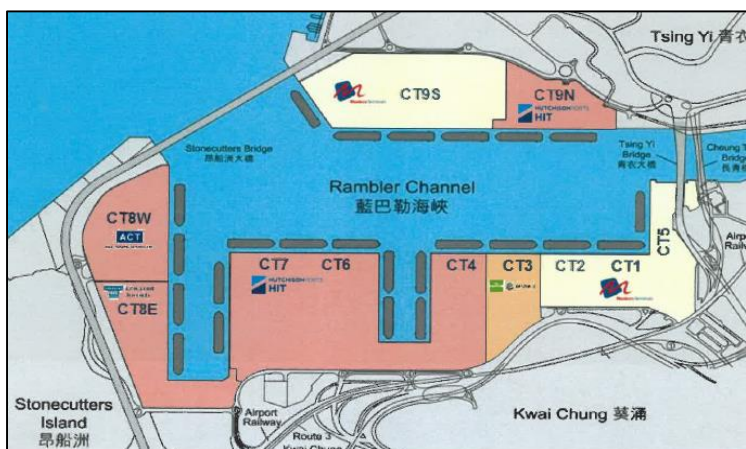
## **II. RELEVANT FACTUAL BACKGROUND**

### **The terminal operators at Kwai Tsing**

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

16. HIT is an indirect wholly owned subsidiary of Hutchison Port Holdings Trust (“**HPH Trust**”), which is listed on the Singapore Exchange.<sup>4</sup> 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.
17. MTL is under the indirect control of The Wharf (Holdings) Limited, which has a 68% interest in MTL.<sup>5</sup> 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 SCT and an 8% effective interest in CCT.
18. The remaining operator at Kwai Tsing is DP World, which operates one berth at CT3 and is not a party to the Alliance.

**Figure 1: terminal operators’ berths at Kwai Tsing**



<sup>4</sup> 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).

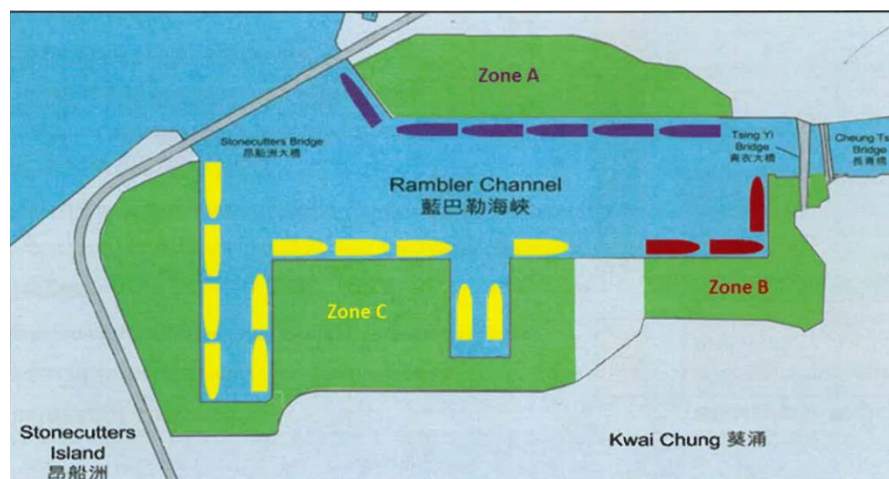
<sup>5</sup> China Merchants Port Holdings Company Limited has a 27% interest, while the Jebesen Group holds the remaining 5% in MTL.



## The Alliance

19. On 8 January 2019, the Parties concluded the JOAA, thereby establishing the Alliance. The term of the JOAA is until June 2047, unless terminated earlier.
20. 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.
21. 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 with respect to pricing, marketing strategy, commercial terms and customer allocation; and
  - (c) *Financial coordination*, involving sharing of operational profits and losses ('Adjusted EBITDA<sup>6</sup> 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**



<sup>6</sup> EBITDA means earnings before interest, taxes, depreciation and amortization.

22. Adjusted EBITDA Sharing and certain key aspects of operational coordination commenced on the Reference Date, while remaining elements of envisaged cooperation are being implemented in phases.
23. 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.
24. 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.

### III. COMPETITION CONCERNS IDENTIFIED BY THE COMMISSION

#### Framework for assessment

25. The Alliance is a horizontal co-operation agreement between separate undertakings, and thus falls within the First Conduct Rule.<sup>7</sup>
26. 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.<sup>8</sup>
27. 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,<sup>9</sup> or if the co-operation enables the parties to the agreement to create, maintain or strengthen their market power.<sup>10</sup>

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<sup>7</sup> 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.

<sup>8</sup> FCR Guideline, paragraphs 6.100 (on joint production agreements) and 6.114 (on joint selling agreements).

<sup>9</sup> FCR Guideline, paragraphs 6.96 to 6.99 (joint production agreements) and 6.109 to 6.112 (joint selling agreements).

<sup>10</sup> FCR Guideline, paragraph 3.20.

28. 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.
29. 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 high level of integration between the Parties and the potential restrictive effects of the Alliance on competition.
30. 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 First Conduct Rule.<sup>11</sup> When assessing whether an agreement has an anti-competitive effect, the Commission may consider effects that are *likely* to flow from the agreement, as opposed to actual effects.<sup>12</sup>
31. 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***

32. 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.<sup>13</sup>
33. 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

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<sup>11</sup> 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.

<sup>12</sup> See in this respect the FCR Guideline, paragraph 3.17.

<sup>13</sup> 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.

cargo to shipping lines (“**Relevant Services**”).<sup>14</sup> 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

34. 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 ‘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.
35. 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.

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<sup>14</sup> 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.

### Geographic market definition

#### *International Transshipment market*

36. 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.
37. 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.
38. During its investigation, the Commission considered whether the market should be further sub-divided according to particular trade routes served by shipping lines. In particular, some shipping lines expressed less flexibility in port choices for International Transshipment cargo on certain trade routes. For example, it was submitted that on Asia to Europe routes, Busan is in the opposite direction from Kwai Tsing and substituting it for Kwai Tsing would result in further sailing costs.
39. While the Commission acknowledges that not every port found to be in the same market as Kwai Tsing will act as a significant competitive alternative on every trade route, this does not cause it to adopt a narrower market definition. In particular, the available evidence did not provide a strong basis for sub-dividing the market according to the trade routes operated by shipping lines (such as Asia to Northern Europe, Asia to West Coast North America).<sup>15</sup> Prices charged by the Parties for International Transshipment cargo are not systematically tailored to those trade routes. Where the prices for International Transshipment cargos differ, in most cases they do so according to broad categories (e.g., "Intra Asia", "Trans-Ocean" or "Trans-Continental"), which do not correspond to the trade routes actually operated by the shipping lines. Even where prices differ according to more specific trade routes, those routes are defined in a number of different ways across contracts.
40. 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

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<sup>15</sup> For further detail on these trade routes, see Case BE/0004 *Liner shipping*, Statement of Reasons of 8 August 2017, paragraphs 2.17 to 2.19.

concerns under any plausible definition (including if the market were sub-divided according to the broad categories in certain of the Parties' contracts or trade routes).

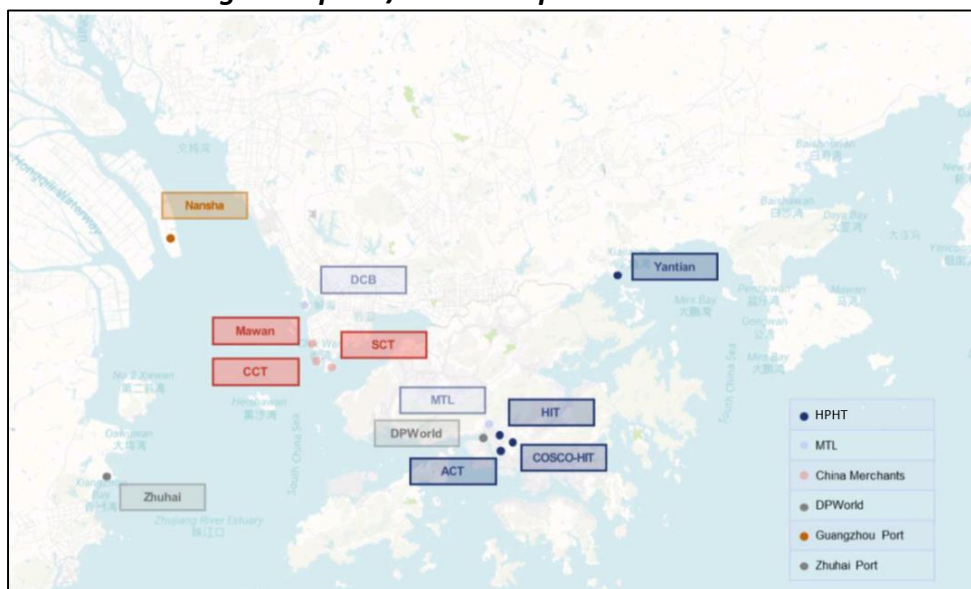
**Figure 3: major ports in East Asia**



#### *Barge Transshipment market*

41. 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.
42. 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

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

45. 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.
46. Based on 2018 data, the market shares in this market are as follows:<sup>16</sup>

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) <sup>17</sup>	3.5	4.8%
DP World	0.1	0.1%
<i>Alliance</i>	6.1	8.3%
<b>Total</b>	<b>73.6</b>	<b>100%</b>

47. 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

<sup>16</sup> 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.

<sup>17</sup> 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%).



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

48. Even if the relevant market was sub-divided by the broad categories which appear in certain of the Parties' contracts or by the trade routes operated by shipping lines (see paragraphs 38 to 39 above), this would not substantially alter the Commission's competitive assessment of the Parties' position, since a number of alternative ports to Kwai Tsing would still exist in each of the potential sub-markets. In this respect, the Commission notes that many shipping lines operate extensive global networks and already have contracts in place with alternative terminal operators in the region. It also has evidence of shipping line switching of International Transshipment cargo away from Kwai Tsing in the face of past price increases. While the Commission accepts that the PRD ports may be less effective substitutes to Kwai Tsing for International Transshipment cargo due to Chinese cabotage rules,<sup>18</sup> it remains the case that sufficient competition from other ports would exist if the market were sub-divided as discussed.

#### *Barge Transshipment market*

49. 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.

50. Based on 2018 data, the market shares in this market are as follows:<sup>19</sup>

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]%
<i>Alliance</i>	<i>[6-10]</i>	<i>[20-30]%</i>
<b>Total</b>	<b>[20-25]</b>	<b>100%</b>

<sup>18</sup> Under these rules, foreign-flagged vessels are not allowed to load a container in one Mainland Chinese port and unload it at another Mainland Chinese port.

<sup>19</sup> 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.

51. 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;
- (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);<sup>20</sup> and
- (f) as such, the Parties are and will continue to be subject to effective competitive constraint from outside the Alliance.

#### *Gateway market*

52. 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.

53. 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;

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<sup>20</sup> 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.

- (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, these 'marginal customers' are unlikely to be sufficient in number to constrain a potential price increase by the Parties in the Gateway market.
54. 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.

***Effects in related markets***

55. 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)***

56. 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.<sup>21</sup> 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.
57. 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***

58. 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]

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<sup>21</sup> 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 operation). 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.

**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.

59. 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**

### ***Efficiencies claimed by the Parties***

60. The Parties have claimed that the Alliance will give rise to the following efficiencies:
- (a) reductions in vessel fuel use by shipping lines, as a result of the reduced waiting times which are expected to arise from joint berth planning and the ability of the Parties to use each other's berths to avoid congestion;
  - (b) reductions in ITT trips, which arise when containers are moved between different terminal operators who control different sets of yards, again as a result of optimisation of berth usage;<sup>22</sup>
  - (c) productivity convergence in drayage and equipment operations;<sup>23</sup>
  - (d) more efficient deployment of each Party's staff;
  - (e) off-leasing of HIT's off-dock depot (which is used for additional yard space), as a result of better utilisation of common yard space after implementation of the Alliance;
  - (f) better utilisation of existing yard capacity, through combining the Parties' respective yard complexes;
  - (g) unifying the separate electronic terminal operating systems operated by HPHT Limited and MTL;

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<sup>22</sup> Customers are charged for ITT trips resulting from their own requests (for example, that a container be transhipped to another vessel at another operator's terminal), while ITT trips resulting from a terminal operator's own operational constraints are not directly charged to customers and would be borne by the terminal operator.

<sup>23</sup> Drayage in this context refers to the movement of containers over short distances within the port, i.e. to and from vessels and around the container yard. Equipment operations refers to the operation of cranes and other heavy equipment required to perform the drayage.

- (h) streamlining barge operations, through better berth allocation and utilisation of quays;
  - (i) reduction in the number of ‘gatehouses’, which are used to monitor and safeguard the traffic of valuable containers into and out of the yard complex, by sharing of gatehouses between the Parties;
  - (j) elimination of double marginalisation in cross-Party transshipment operations; and
  - (k) general improvements in service quality as well as process innovation.<sup>24</sup>
61. Certain of these claimed efficiencies would directly accrue to customers. For example, optimisation of berth usage is expected to give rise to reductions in ITT trips charged to customers and shorter vessel waiting times, which would automatically benefit shipping line customers. Other claimed efficiencies could give rise to cost savings for the Parties (such as unifying the electronic terminal operating system or gatehouse sharing), which would only accrue to customers if passed on by the Parties, for example, through lower prices. Those can be considered to be ‘indirectly accruing efficiencies’.
62. The Commission’s investigation has found that the Alliance may allow the Parties’ shipping line customers to enjoy some (though not all) of the claimed efficiencies, including:
- (a) reduction in fuel use from shorter vessel waiting times;
  - (b) reductions in ITT trips chargeable to customers; and
  - (c) better utilisation of existing yard capacity.

### ***Assessment under the Efficiency Exclusion***

63. For the efficiencies claimed by the Parties 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.<sup>25</sup>

<sup>24</sup> The Parties subsequently put forward additional miscellaneous efficiency savings related to, for example, security, repair and maintenance costs. These did not, however, cause the Commission to revisit its position on the application of the Efficiency Exclusion.

<sup>25</sup> The Efficiency Exclusion applies where the relevant agreement:

“(a) contributes to–

(i) improving production or distribution; or

64. The Commission does not consider that the relevant efficiencies 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.<sup>26</sup>
65. 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 62 could benefit shipping line customers in, particularly, the International Transshipment and Barge Transshipment markets.

#### IV. THE REVISED COMMITMENTS

##### Relevant legal framework

##### *Generally*

66. 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.
67. If the Commission accepts a commitment, it will terminate its investigation and not bring proceedings in the Competition Tribunal regarding the matters covered by the commitment.
68. This is subject, however, to the ability of the Commission to withdraw its acceptance of the commitment under the circumstances provided for in section 61 of the Ordinance, including where there has been a material change of circumstances or a failure to comply with the commitment (see also paragraph 71 below).

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*(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]”.*

<sup>26</sup> FCR Guideline, Annex, paragraph 2.18.

69. The Ordinance does not require parties offering a commitment to make any admission of a contravention.
70. 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.

### ***Failure to comply***

71. Where the Commission has the requisite basis to consider a party making the commitment has failed to comply with the commitment, it may:
- (a) withdraw acceptance of the commitment under section 61 of the Ordinance. The Commission may then commence an investigation or bring proceedings in the Tribunal with respect to alleged contraventions occurring after it gave notice of the withdrawal; and
  - (b) apply to the Tribunal for one or more of the orders in section 63 of the Ordinance. Under such orders, the person who made the commitment may be directed to take or refrain from action specified in the commitment, pay a sum to the Government or compensate a third party for loss or damage caused by the failure to comply with the commitment. The Tribunal may also make any other order it considers appropriate.

### **Summary of the Revised Commitments**

#### ***Recitals***

72. The recitals in paragraphs 1 to 4 of the Revised Commitments record various matters, including:
- (a) the objective of the Revised Commitments, which is to address the Commission's competition concerns in relation to the Alliance (paragraph 1);
  - (b) that the Revised Commitments do not constitute an admission by the Parties of a contravention of a competition rule (paragraph 2); and
  - (c) the objectives of the JOAA, which include improving the Parties' service offering to the benefit of their customers, and the fact that the Parties have made business plans and adopted mechanisms under the JOAA in order to ensure that all users of

the corresponding services will receive a fair share of the relevant benefits generated from the Alliance (paragraph 3).

***Cap on Gateway cargo handling charges***

73. 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.
74. Pursuant to paragraph 7 of the Revised Commitments, the Parties will cap cargo handling rates in the Gateway market (referred to as “Container Charges for Gate Traffic” in the Revised 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.
75. 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 the Reference Date (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. Under the modification in the Revised Commitments, the cap does not affect the validity of any such lower charges or additional discounts or rebates already agreed after the Reference Date.
  - (d) Finally, 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).
76. The Commission considers that the cap will restrict the Parties’ ability to raise their Gateway cargo handling charges, while allowing shipping lines to retain sufficient flexibility to negotiate different levels of charges with the Parties from those in force on the Reference Date. It thus appropriately addresses the competition concern in this market.



### ***Services levels for Gateway cargo***

77. 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.
78. Pursuant to paragraph 8 of the Revised Commitments, the Parties 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,<sup>27</sup> and publishing information about both metrics. In addition, under the modification in the Revised Commitments, the Parties commit to ensuring that any contractual provisions in an individual shipping line customer’s contract which relate to operational productivity levels specific to Gateway cargo are no less favourable than equivalent provisions in place as at the Reference Date.
79. The Commission considers that this 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, while the modification in the Revised Commitments will ensure that shipping line customers are not subject to contractual provisions regarding operational productivity levels specific to Gateway cargo that are less favourable than those in place as at the Reference Date.

### ***Cap on Other CP Charges***

80. 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<sup>28</sup> are the only suppliers of the service in question and do not offer a free alternative.
81. Pursuant to paragraphs 9 and 10 of the Revised Commitments, the Parties commit to 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

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<sup>27</sup> 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.

<sup>28</sup> 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.

to as charges for “Gate Traffic-Related Services” in the Revised Commitments). The Parties commit to the following (subject to indexation as described further below):

- (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 the Reference Date;
  - (b) for existing services that do not qualify as Gate Traffic-Related Services as at the 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. This provision covers, for example, the charges levied by OnePort for the Electronic Release Order for import containers (‘eRO’) and the Electronic Terminal Receipt which is issued at drop off of a container in Kwai Tsing (‘eTR’). For both of these services, a free paper-based alternative is currently available. However, should the free alternative be phased out in the future, the charges for these services would then fall within this cap;
  - (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.
82. The Commission considers that the 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)***

83. To address the Commission’s concern around the provision of overflow services to CT3, the Parties commit to maintaining 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 the Reference Date, unless otherwise requested by the operator of CT3 and subject to indexation. This is provided for in paragraph 11 of the Revised Commitments.
84. The Commission considers that the 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.

### ***Cross-directorships with CCT and SCT***

85. 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,<sup>29</sup> albeit that that constraint would be somewhat softened because MTL holds minority stakes in the terminal operators at these ports, CCT and SCT. It notes, however, that MTL also appoints directors to CCT and SCT and the two MTL appointees have also held management positions within the Alliance.
86. 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 will ensure that no MTL representatives appointed to serve on the Governing Committees of the Alliance are appointed as directors of CCT or SCT (see paragraph 12 of the Revised Commitments).
87. The Commission considers that this commitment addresses the potential competition concern around anti-competitive information flows between the Alliance and CCT and SCT.

### ***Indexation***

88. Paragraph 13 of the Revised Commitments include 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. The mechanism is as follows:
- (a) Indexation will occur by reference to the Consumer Price Index A (“**CPI(A)**”), which is one of the four indices published by the Census and Statistics Department.
  - (b) When the upward changes in the annual CPI(A) in the period since the Reference Date 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.
  - (c) Thereafter, they will be permitted to adjust the individual caps upwards by the level of the annual CPI(A) change.
  - (d) No prior decision of the Commission or another party will be required in order for the Parties to adjust the individual caps, as it will be readily apparent whether the conditions for indexation are met based on the changes in the annual CPI(A) as published by the Census and Statistics Department. The Monitoring Trustee will, however, generally ensure that prices do not exceed the caps following indexation (see further paragraph 94 below).

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<sup>29</sup> See also footnote 20 above.

89. The Commission considers that the indexation mechanism 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 Revised Commitments become effective. As for the use of CPI(A), this is the index most widely used by the Parties and their customers, for example in their contracts.

***Duration, release and variations of the Revised Commitments***

90. In terms of duration, the Parties commit that:
- (a) the commitments on service levels (for gate access to their terminals in Kwai Tsing and turnaround time for external trucks) and MTL's cross-directorships would remain in place for the duration of the Alliance, unless otherwise agreed by the Commission (paragraph 15 of the Revised Commitments); and
  - (b) the other commitments (on Gateway cargo handling charges, contractually stipulated operational productivity levels specific to Gateway cargo, Other CP Charges and overflow services to the Operator of CT3) 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 of the Revised Commitments).
91. With regard to the 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 commitments with a view to varying, substituting or releasing the commitments under section 62 of the Ordinance. If the Commission does not review the commitments and explain to the Parties whether or not it proposes to vary, substitute or release them, the relevant commitments would lapse after five years from the Effective Date.
92. The Parties also retain a general right to request a review of the Revised Commitments and commit themselves to assisting the Commission in such reviews (paragraphs 16 and 17).
93. 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 commitments relating to Gateway cargo. However, the available evidence is unclear as to the imminence and extent of these developments. In the circumstances, the Commission considers that the 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 Revised Commitments if developments (for example, at the PRD ports) so warrant.

***Reporting, compliance and monitoring of the Revised Commitments***

94. The Parties have committed to the following reporting and monitoring mechanism in order to ensure compliance with the Revised 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 Revised Commitments in the future, including the proposed methodology for assessing compliance with the substantive 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 Revised 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 Revised 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 Revised Commitments, receive concerns raised by customers regarding the Parties' compliance with the Revised Commitments, and report to the Commission where the Commission suspects the Parties to have failed to comply with the Revised 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 Revised 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.
95. The Commission considers that these measures are suitable to monitor the Parties' compliance with the Revised Commitments in an effective, thorough and ongoing manner. Should the Parties fail to comply with the Revised Commitments, the Commission would be able to take the actions outlined in paragraph 71 above.

### **Implementation and effect of the Revised Commitments**

96. According to paragraph 5 of the Revised Commitments, the Effective Date of the Revised Commitments is the date on which the Parties receive formal notification of the Commission's acceptance of the Revised Commitments (i.e., the date of this notice).
97. In accordance with section 60(4) of the Ordinance, upon acceptance of the Revised Commitments 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 Revised Commitments are concerned.

## **V. REPRESENTATIONS RECEIVED ON THE ORIGINAL COMMITMENTS**

98. The Commission received nine representations in the course of the public consultation, as follows:
- (a) from shipping line customers:
- i. Evergreen Marine (Hong Kong) Limited ("**Evergreen**");
  - ii. Hapag-Lloyd (China) Limited ("**Hapag-Lloyd**");
  - iii. A.P. Moller – Maersk Group ("**Maersk Group**");
  - iv. CMA CGM (China) Shipping Limited ("**CMA CGM**"); and
  - v. Orient Overseas Container Line Limited ("**OOCL**");
- (b) from competitors: DP World;
- (c) from representatives of downstream customers: Hong Kong Shippers' Council ("**Shippers' Council**") and Hongkong Association of Freight Forwarding & Logistics ("**HAFFA**"); and

(d) from a private citizen: Mr. Sinchit Lai.

99. In general terms, a number of the Parties' shipping line customers indicated their agreement with, or lack of objection to, the Original Commitments (i.e., Evergreen, Hapag-Lloyd, OOCL (subject to a comment on duration) and CMA CGM (subject to a comment on commercial coordination)). DP World endorsed the commitment relating to overflow arrangements.
100. No party indicated that the Original Commitments were not appropriate as the enforcement outcome in this case, though a number of issues were raised as to their specific content and the Alliance more generally. A summary of these issues, including the Commission's response, is provided below.

### **Summary of issues raised on the Original Commitments**

#### ***Cap on Gateway cargo handling charges***

101. Maersk Group suggested amendments to the Original Commitments as follows:
- (a) to clarify that the cap does not impact the validity of any rebate, discount or similar arrangement agreed after the Reference Date. The Commission agrees with this suggestion and the Parties have provided this clarification in paragraph 7(d) of the Revised Commitments;
  - (b) to provide that any lower rate agreed after the Reference Date would remain in force for the duration of the commitments. The Commission does not agree with this suggestion, on the basis that it would effectively extend the relevant rates beyond their contractual term and cannot be justified under the Commission's theory of harm (which suggests the Commission should guard against *increases* in rates for Gateway cargo following the implementation of the Alliance); and
  - (c) to clarify that the cap would apply regardless of whether services are charged separately from the base rate, for example with respect to ITT charges. The Commission considers that the cap in the Original Commitments was already expressed to cover all charges (regardless of whether they formed part of the base rate) but, for the avoidance of doubt, has secured a clarification on ITT charges from the Parties. The definition of Gate Container Handling Services in paragraph 5 of the Revised Commitments, to which the cap in paragraph 7 in turn applies, now expressly refers to ITT charges.
102. Separately, the Shippers' Council indicated that the Original Commitments failed to address shippers' concerns around subsidising of charges in the International Transshipment and Barge Transshipment markets through higher charges in the Gateway market, where there is a lack of competition. The Commission considers that, to the

extent that prices in the Gateway market were higher than in the two other markets *prior to the implementation of the Alliance* as alleged, there is no evidence to suggest that this was the result of any arrangement between the Parties which the Commission could pursue under the First Conduct Rule, as opposed to being the natural result of differences in the competitive pressure experienced by the Parties. The Revised Commitments therefore only aim to deal with the situation following the implementation of the Alliance. In this respect, the cap aims to ensure that charges will be no higher in the Gateway market, and thus ensure that customers are ‘no worse off’, than prior to the Alliance (subject to indexation).

### ***Service levels for Gateway cargo***

103. Maersk Group suggested amendments to the Original Commitments as follows:

- (a) to extend the service level commitment to the other two primary markets (i.e. the International Transshipment and Barge Transshipment markets). The Commission does not agree with this suggestion, on the basis that the purpose of commitments is to address the Commission’s competition concerns and it did not find that competition concerns would be likely to arise in those markets;
- (b) to provide that customers in the Gateway market are ensured a service level that is, as a minimum, identical to the service level in a customer contract in force as at the Reference Date. In the Commission’s view, while the service level commitment already provided a guaranteed level of service for Gateway cargo in respect of two key service level metrics, the suggested clarification will ensure that shipping line customers are not subject to *any* contractual provisions regarding operational productivity levels specific to Gateway cargo that are less favourable than those in place as at the Reference Date as a result of the Alliance. This point has therefore been addressed in paragraph 8(b) of the Revised Commitments, along with some consequential changes to duration and the monitoring trustee’s mandate elsewhere in the Revised Commitments.

### ***Cap on Other CP Charges***

104. The Shippers’ Council suggested that the application of the cap to services such as the Electronic Terminal Receipt (eTR) and Electronic Release Order (eRO) should be clearly spelled out. Accordingly, the Commission has clarified the application of the cap to these services in paragraph 81(b) above.

### ***Indexation***

105. The Shippers’ Council suggested that the indexation mechanism should be clearly laid out and explained to the industry and to the public, as it was unclear how the index is to be



formed, which party is responsible for its monitoring, and how the scrutiny is to be carried out. In response to this suggestion, the Commission has provided further details on the indexation mechanism in paragraph 88 above.

***Duration of commitments related to pricing and overflow arrangements***

106. Both OOCL and Maersk Group queried why the duration of the price-related and overflow commitments was restricted to eight years in the Original Commitments. Maersk Group suggested that the duration of the commitments should be open-ended with a review after five years.
107. The Commission considers that the eight-year duration of the relevant commitments is appropriate on the basis of evidence that the Parties may be subject to more significant competitive constraint in the Gateway market in the coming years as a result of increased competition from other ports in the PRD, thus lessening the need for the relevant commitments (see paragraph 93 above). If the expected increase in competition does not arise, the Parties may seek to extend the Revised Commitments voluntarily so that they continue to benefit from protection from Commission investigation and/or proceedings under section 60(4) of the Ordinance. In the Commission's view, the relevant representations do not provide any new evidence that would justify amending the duration of the relevant commitments to the lifetime of the Alliance.

***Duration of commitments related to MTL's directorships at CCT and SCT***

108. OOCL questioned why MTL's commitment related to its directorships at CCT and SCT did not apply for the lifetime of the Alliance, and noted that the relevant cross-directorships could reduce competitiveness.
109. The Commission agrees that this commitment should remain in place for the lifetime of the Alliance. Should the Parties' commitments on pricing, service levels and overflow arrangements no longer be required in future as a result of an increase in competition from ports in the PRD in the Gateway market (see paragraphs 93 and 107 above), this would provide all the more reason to avoid any cross-directorships between MTL and CCT and SCT, to ensure the latter ports indeed exercised effective competitive constraint on the Alliance. As such, paragraph 15 has been amended in the Revised Commitments so that the relevant commitment in paragraph 12 now applies for the lifetime of the Alliance.

## Summary of other points raised

### *Concerns on the International Transshipment market*

110. Maersk Group has suggested that the Alliance could potentially raise concerns on the International Transshipment market, as a number of ports which the Commission found to form part of the International Transshipment market may not in practice be viable substitutes to Hong Kong on particular trade routes.
111. The Commission's investigation had previously considered whether to sub-divide the market for port terminal services for International Transshipment cargo according to particular trade routes, and found that (i) the evidence did not provide strong grounds for sub-dividing the market definition in this way; and (ii) even if it did, this would not substantially alter the Commission's conclusion as to the absence of competition concerns, since a number of alternative ports to Kwai Tsing would exist in each of the relevant sub-markets. Further details are provided in paragraphs 38, 39 and 48 above.

### *Pass-on of efficiencies to customers*

112. Maersk Group and the Shippers' Council raised issues around the extent to which the economic efficiencies anticipated by the Alliance would be passed on to consumers. Maersk Group specifically proposed a commitment requiring the Alliance to pass on 'a reasonable share' of the cost savings to the end-consumer, and consequential changes to the monitoring trustee's mandate.
113. The Commission's analysis indicates that the Efficiency Exclusion does not apply to the Alliance, as a result of the extent of the competition concerns in the Gateway market. As such, the Commission does not consider there is a basis to secure a commitment from the Parties to meet the terms of that Exclusion (i.e., by passing on efficiencies to the consumer). Instead, the Commission has secured commitments to prevent the potential anti-competitive effects which have been identified in the Gateway and related markets from arising.
114. In response to the concerns raised, the Commission has nonetheless:
- (a) provided further detail around the efficiencies to which the Alliance is expected to give rise (see paragraphs 60 to 62 above). As noted in paragraph 61 above, some of the Alliance's efficiencies will directly accrue to customers and as such will benefit customers regardless of any requirement on the Parties to pass on the relevant efficiencies; and
  - (b) secured an explicit statement from the Parties as to the plans and mechanisms adopted under the JOAA in order to ensure that the planned efficiencies are

realised and all users of the corresponding services receive “a fair share of the relevant benefits generated from the Alliance” (see paragraph 3 in the recitals to the Revised Commitments).

### ***Financial and commercial coordination***

115. Mr. Lai and CMA CGM questioned whether financial and/or commercial coordination were in fact necessary for the Alliance to achieve operational coordination (from which the Alliance’s efficiencies appear to flow). CMA CGM proposed a commitment preventing commercial coordination, while Mr Lai suggested the Parties should be required to terminate their commercial and financial coordination partially or entirely.
116. The Commission’s investigation has found that the operational coordination under the Alliance would not be possible without at least financial coordination and possibly also commercial coordination.
117. In particular, through measures such as joint berth planning and pooling of other resources, operational coordination envisages that an individual Party (A) will allow the shipping line customer of another Party (B) to berth at their terminal and will provide terminal services to that customer. At the same time, B will retain the contractual relationship with the customer and receive payment from the customer under the terms of the relevant contract. Without the sharing of profits and losses through financial coordination, A would have little incentive to provide services to B’s customers and would instead prioritise serving its own customers.<sup>30</sup> The ‘terminal neutrality’ which governs the Alliance would thus not be realised, nor the associated efficiencies.
118. In a similar fashion, the alignment of commercial terms could also facilitate the Parties’ handling of each other’s customers. In any event, with financial coordination in place, the Parties would be unlikely to compete with each other on price or other commercial terms even if they did not engage in commercial coordination, as this would diminish their shared net profits.

### ***Miscellaneous comments***

119. The Shippers’ Council suggested that details of compliance with, and the penalties for violation of, the Original Commitments should be clearly spelled out. The Commission has provided further details on the remedies available to the Commission in the case of non-

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<sup>30</sup> Mr. Lai acknowledges that berth/zone re-allocation may benefit certain of the Parties at the expense of others but suggests that, instead of a long-lasting co-management and profit-sharing scheme, the benefitting Parties could compensate the others by means of a one-off payment. From the perspective of each Party’s financial management, however, it seems difficult to conceive that operational coordination on the scale envisaged could be carried out for the lifetime of the Alliance (which is due to last until 2047), with a compensatory payment only made on a single occasion.

compliance by the Parties in paragraph 71 above, and on the mechanism to monitor compliance with the Revised Commitments through an independent monitoring trustee in paragraph 94 above.

120. HAFFA indicated it would have serious concerns if the Alliance were to give rise to price increases and the absence of affordable alternatives in the Hong Kong market in future. The Commission notes that its analysis only suggests that the Alliance could potentially give rise to price increases with respect to services provided for Gateway cargo, and for this reason, it has obtained commitments from the Parties to prevent possible price increases for those services.

## **VI. COMMISSION ACCEPTANCE OF THE REVISED COMMITMENTS**

121. In light of the foregoing and having carefully considered the representations received, the Commission considers that the Revised Commitments are appropriate to address its concerns about a possible contravention of the First Conduct Rule by the Parties to the Alliance.
122. Through the Revised Commitments, the Parties will cap charges for Gateway cargo and Other CP Charges, guarantee particular minimum service levels, guarantee overflow arrangements to DP World and avoid cross-directorships with CCT and SCT. The Commission considers the Revised Commitments will thus ensure that the potential anti-competitive effects in the Gateway and related markets which have been identified above do not arise in future. To the extent that those effects have arisen since the implementation of the Alliance, the Revised Commitments also would require the Parties to immediately restore the relevant prices and service levels to the levels that applied prior to implementation (i.e., as at the Reference Date).
123. As such, the Revised Commitments will resolve the Commission's competition concerns in an effective and timely manner and achieve the Remedial Goals as set out in paragraph 3.13 of the Commission's Enforcement Policy. The Commission also considers that the Revised Commitments provide an enforcement response that is proportionate to the context of the Parties' conduct under the Alliance and the harm caused or likely to occur, consistent with paragraph 3.14 of the Enforcement Policy.
124. In accordance with the requirements of section 60(6) and Schedule 2, section 4 of the Ordinance, therefore, the Commission hereby gives notice that, in exercise of its powers under section 60 of the Ordinance, it has decided to accept the Revised Commitments.
125. Finally, and for the avoidance of doubt, the Commission's acceptance of the Revised Commitments reflects the specific circumstances of the case and relevant market context. It is not necessarily indicative of the Commission's enforcement approach in other cases or market contexts and does not bind the Commission in this respect.