

Sent by email to: Consultation@compcomm.hk

Representations on Case EC/03AY
Competition Commission
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Representations on Case EC/03AY

With reference to your email dated 12 August to Maersk Hong Kong Limited and Hamburg Sud Hong Kong Limited as well as your email dated 14 August 2020 to Damco Hong Kong Limited, we are hereby submitting our non-confidential representations in the above-mentioned matter, including on the Commission's proposed acceptance of the Proposed Commitments (as defined in the 25/08/2020 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)" ("the Notice")).

As stated in our email of 14 August 2020 to Ms. Erika Yu, the following representations are made on behalf of the A.P. Moller - Maersk Group ("Maersk"), including Maersk Line, Hamburg Sud, and Damco. A full overview of Maersk is available at <https://www.maersk.com/logistics-solutions>.

We would be very happy to engage further with the Commission in this matter, notably to elaborate on the industry and market dynamics described below. Such engagement could happen virtually or in person depending on the Commission's preference, and we can make ourselves available at short notice.

Thank you for contacting us and for considering our representations.

Best regards,

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1. Executive Summary of Maersk's representations

- a. As concluded by the Commission, the Alliance will "eliminate competition between HIT and MTL, which are the largest players and each other's closest competitors in Kwai Tsing"¹, by "bringing approximately [90-100] % of Kwai Tsing's throughput in the Gateway market under the operation of the Alliance based on 2018 data"².
- b. The competition concerns of the Alliance's operational, commercial and financial coordination, identified by the Commission in its investigation, must be addressed appropriately by revising the Proposed Commitments as suggested in para 2 below. In our view, the Proposed Commitments will not in their current form offset any of the anti-competitive effects of the Alliance.
- c. In particular, we suggest the addition of a commitment on the Alliance to pass on a reasonable share of any cost efficiencies generated by the Alliance to its customers, irrespective of whether such cost efficiencies stem from the markets of international transshipment cargo, barge transshipment cargo, and/or gateway cargo, and we suggest to extend the commitment regarding service levels to all markets where the Alliance is active.
- d. Moreover, we also suggest a revision of the duration of the commitments to be open-ended with a possibility for the Alliance to request for consultation after a period of five years after the effective date of the commitments.
- e. Regarding the relevant market definition, we believe that the Alliance could potentially raise competition concerns on the international transshipment market as well, given that Asian hubs such as Busan, Singapore and Tanjung Pelapas may not in practice be viable substitute to Hong Kong under the current market dynamics. In addition, due to the Chinese cabotage rules, the Chinese PRD ports cannot be considered to compete for all the Hong Kong international transshipment cargo in practice.
- f. In respect of the market for gateway cargo, we believe the analysis of the Alliance and the Proposed Commitments, including their proposed duration, should be founded on a geographic market definition of the

¹ Para 48 (a) of the Notice

² Para 48 (b) of the Notice

gateway market to Kwai Tsing, as any future plans of expansion and/or efficiency improvements by other PRD ports will in any case be of very limited relevance.

- g. As for the efficiencies of the Alliance, we believe that these could partly mitigate the anti-competitive effects of the Alliance, as identified by the Commission, if the Alliance commits to pass on a reasonable share of these cost efficiencies its customers. Such pass on should be irrespective of whether the cost efficiencies stem from the markets of international transshipment cargo, barge transshipment cargo, and/or gateway cargo.
- h. Lastly, we believe that if the Commission allows an operational, commercial and financial coordination between competitors with a market share of 90-100% on one of the relevant markets and considerable presence on the remaining two relevant markets, after having identified anti-competitive effects of such coordination, this should be reflected by the Commission making the commitments on the Alliance open-ended.
- i. When considering the market dynamics and the level of integration within the Alliance, it appears unlikely that the competition concerns, that the Alliance currently gives rise to, should no longer be present in eight years. Should that, however, be the case, we suggest there to be a mechanism in the commitments for the Alliance to request the Commission for a consultation, after a period of five years from the effective date of the commitments, with the purpose of varying, substituting or releasing the commitments.

2. Maersk's suggested revisions to the Proposed Commitments

- a. In order for the Commission to mitigate the identified anti-competitive effects of the Alliance, we suggest the Proposed Commitments to be revised as follows:
 - i. An *addition* of a new commitment on the Alliance to pass on a reasonable share of any cost efficiencies generated by the Alliance to its customers, irrespective of whether such cost efficiencies stem from the markets of international transshipment cargo, barge transshipment cargo, and/or gateway cargo. In respect of determining a "reasonable" share of the cost efficiencies to be passed on to customers, we believe this would most appropriately be defined by the Commission;

- ii. A *clarification* that the proposed commitment regarding a cap on gateway cargo handling charges applies to any and all services delivered by the Alliance to customers in respect of gateway cargo, regardless of whether such services are charged separately from the base rate for container moves, such as inter-terminal trucking services;
- iii. A *clarification* that the proposed commitment regarding a cap on gateway cargo handling charges does not impact the validity of any rebate, discount or similar arrangement agreed after the Reference Date. Accordingly, any lower rate that was agreed after the Reference Date would remain in force for the duration of the commitments;
- iv. A *clarification* that the proposed commitment regarding service levels in the gateway market ensures customers a service level that is, as a minimum, identical to the service level of the Reference Date. Accordingly, any agreed service level in a specific customer contract in force on the Reference Date would, as a minimum, be committed to by the Alliance for the duration of the commitments. As an *addition*, this commitment should apply to service levels in all markets where the Alliance is active, including but not limited to the gateway, international transshipment and barge transshipment markets;
- v. A *revision* of the duration of the commitments to be open-ended with a possibility for the Alliance to request for consultation after a period of five years after the effective date of the commitments;
- vi. An *extension* of the commitment for the Alliance to report to a Monitoring Trustee to comprise information about any generated cost efficiencies and how the designated reasonable share of such cost efficiencies has been passed on to the customers of the Alliance; and
- vii. An *extension* of the scope of the Monitoring Trustee's mandate to report to the Commission also on the passing on of a reasonable share of the cost efficiencies to the customers of the Alliance.

3. Relevant market definition (para 30-40 of the Notice)

- a. In respect of the applied geographic market definition of the International Transshipment market, we believe it may be relevant to further include the network characteristics of the shipping industry as well as the regulatory framework in the PRD that the shipping industry operates under in the analysis.

Although the Commission has ultimately left the geographic market definition of the International Transshipment market open, we believe that this market may plausibly be narrower in practice than presumed by the Commission.

While we appreciate the Commission's conclusion not to define the exact geographic scope of the international transshipment market, we would like to provide the Commission with the following observations from our practical experience with international transshipment within Asian ports.

- b. Firstly, in our experience, Asian hubs such as Busan, Singapore and Tanjung Pelapas are, in principle, relevant substitutes to Hong Kong when looking at international transshipment.

However, given that all our long-haul trades (e.g. Far East Asia to North Europe, and Far East Asia to North America) form part of our global network, any substitution of Hong Kong with Busan, Singapore or Tanjung Pelapas for our international transshipment volumes would require a comprehensive refurbishment of large parts of our network and, accordingly, influence the service coverage, transit times, and schedules that we are able to offer to our customers.

There would also potentially be switching costs incurred by substituting Hong Kong for international transshipment, which would make such business case less favourable, depending on the level of probable cost recovery from any related network efficiencies elsewhere.

- c. From a network perspective, looking specifically at Busan as a potential substitute for Hong Kong international transshipment on the Far East Asia to North Europe trade (Maersk's most important trade in terms of volumes), [confidential information redacted], Busan is in the opposite direction when the vessel is bound for North Europe, which would incur further network costs for us and, in turn, our customers.

- d. Looking specifically at Singapore and Tanjung Pelapas as potential substitutes for Hong Kong international transshipment, these ports enjoy a good location, and both offer good handling of transshipment connections. However, we estimate that shifting our international transshipment volumes to Singapore and/or Tanjung Pelapas would result in higher network costs, as [confidential information redacted].

Moreover, as Maersk's selection of ports is predominantly driven by customer demands, Singapore and Tanjung Pelapas are less relevant to us for international transshipment on the Far East Asia to North Europe trade, as most of our cargo on this trade originates from Northern and Eastern China.

The above is not to say that substituting Hong Kong with Singapore and/or Tanjung Pelapas for international transshipment is impossible, and it has been tried by us in the past. However, due to the required changes of our global network to cater for such substitution (which is a factor relevant to all global shipping lines) as well as demand from our customers in terms of port coverage, in practice we do not consider Singapore and Tanjung Pelapas to be viable substitutes to Hong Kong for international transshipment for the time being.

- e. Secondly, looking at the Chinese PRD ports as potential substitutes for Hong Kong in respect of international transshipment, it should be noted that cargo originating from or destined for China is subject to transshipment restrictions following from the Chinese cabotage rules.

In essence, these rules prohibit foreign-flagged and foreign-owned vessels from transporting cargo from one Chinese port to another. Due to the current status of Hong Kong as a Special Administrative Region of China, transporting cargo from China to Hong Kong and vice-versa is not considered as cabotage, which makes Hong Kong the obvious choice for international transshipment over any Chinese PRD port.

- f. Thirdly, while demand for international transshipment has generally increased over the past five years, the capacity of the Asian hubs such as Busan, Singapore and Tanjung Pelapas has not been increased to respond to the demand changes.

Accordingly, we estimate that both Busan, Singapore and Tanjung Pelapas at present have less available capacity to absorb a shift of our international transshipment volumes from Hong Kong. Also, for this reason, Busan,

Singapore and Tanjung Pelapas may not in practice be a viable substitute to Hong Kong under the current market dynamics.

- g. In respect of the applied geographic market definition of the Gateway market, we note that, according to the Commission, 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 (para 85 of the Notice).
- h. While such expansions and efficiency improvements of other PRD ports may be implemented in the future, we believe that the geographic market definition of the gateway market will remain limited to Kwai Tsing for the reasons listed by the Commission in para 40 of the Notice.
- i. Accordingly, we believe the analysis of the Alliance and the Proposed Commitments, including their proposed duration, should be founded on a geographic market definition of the gateway market to Kwai Tsing, as any future plans of expansion and/or efficiency improvements by other PRD ports will in any case be of very limited relevance.
- j. As a final note regarding the relevant market definitions, we also wish to highlight the fact that in our experience there is no competitive constraint from the international transshipment cargo on the gateway cargo (rates) in Hong Kong due to the geographic scope and nature of the Gateway market.
- k. Consequently, customers of the Alliance are not able to negotiate the rates of gateway cargo by proposing to otherwise switch their international transshipment volumes to e.g. Busan, Singapore and Tanjung Pelapas if those were considered feasible alternatives by customers.
- l. This, in addition to the stronger market position the Alliance enjoys if one considers Busan, Singapore and Tanjung Pelapas as well as the Chinese PRD ports excluded in practice as substitutes for Hong Kong, should also be taken into consideration by the Commission when determining the appropriate commitments to mitigate the anti-competitive effects of the Alliance identified by the Commission.

4. Efficiencies (para 55-58 of the Notice)

- a. Para 55 of the Notice lists those of the alleged efficiencies from the Alliance that the Commission believes shipping line customers may enjoy. At the same time, as stated by the Commission, any such efficiencies are not sufficient for the Alliance to satisfy the Commission's Efficiency Exclusion.
- b. We believe that if the Commission is willing to allow the Alliance to "eliminate competition between HIT and MTL, which are the largest players and each other's closest competitors in Kwai Tsing"³, by "bringing approximately [90-100] % of Kwai Tsing's throughput in the Gateway market under the operation of the Alliance based on 2018 data"⁴ and at the same time allow the Alliance to maintain the rate level of the Reference Date - i.e. at a point in time where no efficiencies had been generated by the Alliance and, even less so, been passed on to customers - this should be reflected by a commitment from the Alliance to pass on a reasonable share of the alliance cost efficiencies to the customers.

Such passing on of cost efficiencies would - at least in part - mitigate the anti-competitive effects of the Alliance identified by the Commission.

- c. On the other hand, absent such commitment by the Alliance to pass on a reasonable share of the cost efficiencies to its customers, we believe that the anti-competitive effects of the Alliance would not be properly offset, as the proposed cap on gateway cargo charges would leave the customers in the exact same commercial situation as before the Alliance was implemented, leading to the Commission's finding of anti-competitive effects.
- d. The proposed minimum service levels in the gateway market would not change this very unfavourable position for the customers of the Alliance.
- e. In respect of determining a "reasonable" share of the cost efficiencies to be passed on to customers, we believe this would most appropriately be defined by the Commission.
- f. In addition, as a customer, we still do not have any insights about the cost efficiencies that the Alliance expects to generate from its operational,

³ Para 48 (a) of the Notice

⁴ Para 48 (b) of the Notice

commercial and financial coordination, respectively, apart from the public information included in the Notice, and also for this reason, we believe that the definition of a "reasonable" share should be left to the Commission.

5. Cap on Gateway cargo handling charges (para 65-68 of the Notice)

- a. When looking at the anti-competitive effects of the Alliance identified by the Commission vis-à-vis the proposed cap on gateway cargo handling charges, we believe that the cap does not (wholly or even in part) offset the negative impact of the Alliance on competition from a customer perspective.
- b. Effectively, the Alliance brings 90-100% of Kwai Tsing's throughput in the gateway market under the operation of the Alliance, and the Alliance proposes to mitigate this extreme market situation by offering to its customers the same rates as before the Alliance became effective.
- c. Noting that the objectives of the Alliance - as defined by the Parties - are "enhancing the efficiency and overall competitiveness of the Port of Hong Kong, increasing utilisation and improving the Parties' service offering to the benefit of their customers"⁵, we believe that a reasonable share of any cost efficiencies generated by the Alliance from the envisaged enhanced efficiency and increased utilization (among other factors) should be passed on to the customers of the Alliance. Accordingly, a commitment from the Alliance in this respect should be a prerequisite for the Commission accepting to conclude its investigation by way of a commitments decision.
- d. In addition to the passing on of cost efficiencies to customers, we also request the Commission to clarify this commitment as outlined in para 2. a. ii and iii above.

6. Service levels in the Gateway market (para 69-71 of the Notice)

- a. With regards to the anti-competitive effects of the Alliance identified by the Commission vis-à-vis the commitment regarding proposed service levels in the gateway market, we believe that this commitment does not (wholly or even in part) offset the negative impact of the Alliance on competition from a customer perspective.

⁵ Para 3 of Annex 1 to the Notice

- b. In addition to the comments above regarding the need for a commitment from the Alliance to pass on a reasonable share of the cost efficiencies to its customers, and such commitment being a prerequisite for the Commission to accept to conclude its investigation by way of a commitments decision, we also believe that the commitment regarding service levels in the gateway market should be clarified as outlined in para 2. a. iv above.
- c. Such clarification would ensure that customers get at least the same service level under their contracts in force on the Reference Date for the duration of the Alliance, and we believe this would be appropriate given the Commission's concern that the Alliance would decrease service levels to customers as a result of the Alliance's market share of 90-100%.
- d. To further offset the anti-competitive effects of the Alliance and with the operational aspects of services levels for all markets affected by the Alliance international transshipment, barge transshipment and gateway cargo in mind, we request the Commission to extend the scope of this commitment to all markets where the Alliance is active, including but not limited to international transshipment and barge transshipment.

As international transshipment and barge transshipment cargo account for 60-80% of the Alliance's throughput, it is essential for customers that the Alliance does not decrease service levels on these markets by deprioritizing them vis-à-vis the gateway cargo market where the Alliance proposes a minimum service level.

7. Duration, release and variations of the Proposed Commitments (para 82-85 of the Notice)

- a. Considering the dynamics of in particular the international transshipment market (see para 3 b.-f. above) and the gateway cargo market (see para 3 g.-j. above), the position of the Alliance on these markets, and the level of operational, commercial and financial coordination within the Alliance, we believe it is unlikely that the anti-competitive effects of the Alliance that the Commission has identified are no longer present in eight years.
- b. If the Commission allows an operational, commercial and financial coordination between competitors with a market share of 90-100% on one of the relevant markets and considerable presence on the remaining two relevant markets after having identified anti-competitive effects of such

coordination, we believe that this should be reflected by the Commission making the commitments on the Alliance open-ended.

- c. Acknowledging that market dynamics do in fact change over time, we also believe there should be a mechanism in the commitments for the Alliance to request the Commission for a consultation with the purpose of varying, substituting or releasing the commitments.
If the Commission intends to vary, substitute or release the commitments, this should follow the procedure under Schedule 2 of the Ordinance, including the obligation to consult before issuing a final decision.
- d. Taking into consideration the level of coordination on all business parameters (operational, commercial and financial), the market position of the Alliance, and the fact that the Alliance has been in force since 1 April 2019 (after the point in time where the Commission had initiated its investigation), we request the Commission to revise the duration of the commitments to be open-ended, with a possibility for the Alliance to request for consultation after a period of five years from the effective date of the commitments.

8. Reporting, compliance and monitoring of the Proposed Commitments (para 86-87 of the Notice)

- a. For the purposes of monitoring the Alliance's passing on of a reasonable share of the cost efficiencies to its customers, we request the Commission to include a commitment for the Alliance to report to the Monitoring Trustee on any generated cost efficiencies and how the designated reasonable share of such cost efficiencies has been passed on to the customers of the Alliance.
- b. The passing on of cost efficiencies should also be subject to the Monitoring Trustee's reporting to the Commission on the accuracy of the Parties' compliance assessment and identification of any failure to comply with the commitments.
