



HONG KONG LINER SHIPPING ASSOCIATION
香港定期班輪協會

COMMENTS OF THE HONG KONG LINER SHIPPING ASSOCIATION ON
THE DRAFT GUIDELINES ISSUED BY
THE HONG KONG COMPETITION COMMISSION

The Hong Kong Liner Shipping Association (“HKLSA”) and its international ocean carrier members serving Hong Kong welcome the opportunity to provide comments to the Hong Kong Competition Commission (“HKCC”) on its Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders – 2014 (hereinafter the “Guideline”).¹

In these comments, HKLSA focuses primarily on policies and procedures pertaining to the HKCC’s consideration and issuance of block exemption orders pursuant to its authority under the Competition Ordinance (“Ordinance”). It is anticipated that the liner shipping industry will seek a block exemption pursuant to the Ordinance for cooperative agreements under which liner shipping companies operate lawfully in most countries in the world. It is critical that liner shipping, which is a key industry to the Hong Kong economy, has legal certainty for its prevailing business model, as it does in virtually all of Hong Kong’s major trading partners. Absent legal certainty, there is a risk that the shipping industry will be forced to lessen or withdraw its commitment to Hong Kong, which in turn will cause Hong Kong to lose out to its competing trading partners in Asia.

Thus, these comments will focus on ways in which the Guideline can be revised to provide legal certainty to liner shipping agreements in a timely manner. In any event, regardless of sector or industry, the general principles underlying these comments – timeliness and certainty – are ones that the HKLSA urges the HKCC to have in mind in finalizing the Guideline.

Introduction

Liner shipping companies are the engines of international trade, providing regularly scheduled ocean transportation service at key ports for essential manufactured goods, raw materials, and foodstuffs worldwide. The HKLSA, established in 1981, is the main voice of liner shipping in Hong Kong on policy and other issues. Representing approximately 90% of the containerized liner industry in Hong Kong, HKLSA occupies a dedicated seat on various Government committees and service industry institutions. HKLSA’s shipping line members consistently provide high quality liner services. Shipping has been identified as a key industry that is vital to economic growth in Hong Kong.

¹ A list of the current HKLSA membership is attached as Attachment A to these comments.

As background, international liner shipping operations require enormous capital investments and coordination of numerous vessels to maintain regular services between hundreds of routings. To maintain and expand the level of services needed to meet the needs of importers and exporters around the world, and to support the investment of billions of dollars in services and equipment, liner shipping's current business model relies in large part upon participation in cooperative arrangements. The agreements, which have origins worldwide going back over a hundred years, permit carriers (amongst other things) to share capacity on each others' vessels, coordinate their services to enhance efficiencies, and discuss economic and market conditions to promote market stability. Under this system, Hong Kong has emerged as one of the premier international maritime centers and trans-shipment hubs in Asia.

Because these agreements involve forms of cooperation amongst competitors, they touch upon conventional competition law policies. Thus, at the appropriate time, the liner shipping industry will seek a block exemption in Hong Kong similar to the exemptions it has been granted throughout the Pacific Rim, including in China, Singapore, Japan, Korea, Taiwan, the United States, and Canada. These competition law exemptions for the shipping industry are the international standard. In anticipation of filing this application, and to avoid any unintended disruption to these agreements in Hong Kong once the Ordinance goes into effect, HKLSA submits the following comments on the HKCC's draft block exemption procedures.

Need for Regulatory Certainty for Shipping Agreements

HKLSA recognizes that the exclusions and exemptions in the Ordinance operate under a "self-assessment" regime – that is, carrier agreements can "self-assess the legality of their conduct having regard to the Conduct Rules and the exclusions and exemptions from those rules"² and, in theory, benefit from those exclusions and exemptions without having to apply to the HKCC.

In practice, however, without a block exemption order providing clear authority for cooperative carrier agreements, the status quo in Hong Kong for liner shipping companies will shift from a system of legal clarity that has existed for decades to one of uncertainty. There is a reasonable chance that many carriers required to "self-assess" the legality of their standard business model would reduce or even cease services in the Hong Kong trade routes because they are not willing to accept the legal risk created by the possibility (however remote) that their agreements might be challenged under the Ordinance at some undetermined point in the future, with any potential exposure dating back to the day on which the Ordinance came into effect. Most companies would naturally be reluctant to risk investments in Hong Kong worth billions of dollars when they have viable and attractive alternatives for those investments in countries such as China, Singapore, Japan and others, where they have legal certainty that existing carrier agreements are permitted to continue to operate unchanged.

Thus, HKLSA urges the HKCC to establish procedures consistent with the requirements in the Ordinance that provide industries such as liner shipping with as much legal certainty as possible by the time the substantive provisions of the Ordinance become effective. Any legal

² Paragraph 5.5 of the Guideline

uncertainty that lasts for more than a very short period of time would have a devastating effect on the ocean carriers serving Hong Kong and thus seriously harm the Hong Kong economy itself. As discussed in more detail below, we suggest two complementary methods by which this could be accomplished.

HKCC Should Accept Block Exemption Applications Before the First Conduct Rule Becomes Effective

First, the HKCC should seek to establish a procedure whereby it can begin to accept block exemption applications as soon as possible, but in any event well before the First Conduct Rule goes into effect. HKLSA understands that at present the HKCC is not empowered to issue decisions on block exemption applications prior to the Ordinance becoming effective. However, early acceptance of such applications would allow the HKCC the ability to review and decide on those applications as soon as possible after the substantive provisions of the Ordinance take effect.

HKLSA believes that acceptance of block exemption applications before the First Conduct Rule comes into effect would benefit both industries serving Hong Kong that seek regulatory clarity as soon as possible, and the HKCC itself, because it would ease the administrative burden and assist in the prompt and efficient handling of these applications. Ultimately, early acceptance of block exemption applications would benefit the wider Hong Kong economy as well, since it would enable the HKCC to determine which types of agreements should be exempt from the competition law as early as possible, meaning the wider economy and Hong Kong businesses would continue to benefit from those agreements operating in Hong Kong. HKLSA notes that this is not without foreign precedent – the liner shipping industry’s application for a permanent block exemption was filed with the Malaysia Competition Commission (“MyCC”) in December 2011, one month prior to the provisions of the Malaysia Competition Act going into effect.

HKLSA understands that the HKCC does not consider it currently has legal powers to accept block exemption applications under the Ordinance. Therefore, early acceptance of applications would require some coordination between the HKCC and the Hong Kong Government. Specifically, both Executive action (publishing a Commencement Notice) and Legislative action (negative vetting) would be required to bring Sections 15 to 20 of the Ordinance (and any other relevant provisions the HKCC deems appropriate) into effect. Once these Sections are in effect, the HKCC would then have clear legal authority to accept and consider block exemption applications and issue block exemption orders.

In view of the importance of timely and efficient consideration of block exemptions applications, HKLSA strongly urges the HKCC to discuss the above option with Government as soon as possible. The HKLSA will be pleased to offer any assistance to facilitate these discussions, if the HKCC would find this helpful.

The Guideline Should Provide For Issuance of Interim Exemptions or Statements of Non-Enforcement After the Ordinance is Effective

In addition, as a second option, the HKLSA urges the HKCC to implement special procedures that would permit it to consider and grant interim block exemption orders to certain industries or classes of agreements pending final determination on applications. Although the possibility of issuing interim exemptions was not discussed in the Guideline, there is international precedent for the issuance of this type of interim relief from competition laws.

For example, the Malaysia Competition Act of 2010 and the Malaysia Competition Commission Act of 2010 both went into effect on January 1, 2012. Prior to that date, the liner shipping industry filed an application with the MyCC for a block exemption pursuant to Section 8 of the Competition Act. In its application, the industry requested that the MyCC afford the liner shipping industry an interim block exemption in order to avoid disruption to liner shipping services calling Malaysian ports. The MyCC granted the liner industry's request by issuing an interim exemption – in effect a statement that the industry would be afforded immunity from the rule prohibiting anticompetitive agreements – on January 11, 2012, less than two weeks after the Competition Act went into effect.

Following the issuance of an interim exemption, the MyCC then took the time to carefully study the industry's application. On July 7, 2014, following a substantive review of the application and a reasonable time period for public consultation, the MyCC granted a permanent block exemption for cooperative liner shipping agreements for a period of three years. As a result of the MyCC's grant of interim relief for the industry while considering the application for a more permanent exemption, there was no disruption to liner services in Malaysia during this period of review, which benefitted carriers, their customers, and the Malaysian economy.

HKLSA strongly urges the HKCC to provide for a means whereby it can consider action similar to the MyCC's action in Malaysia. HKLSA understands that there is no formal mechanism in the Ordinance for the issuance of interim exemptions. However, this is no different than the Malaysia Competition Act, which also does not contain any express authority for the MyCC to issue interim relief. Nevertheless, the establishment of procedures for the issuance of interim exemptions after the substantive provisions of the Ordinance take effect would not require any Executive or Legislative action, and would be consistent with the HKCC's authorities set forth in the Ordinance.³

In other words, the HKCC could treat the interim block exemption as either: (1) a formal, but more limited, block exemption order under Section 15 of the Ordinance; or (2) a statement of non-enforcement by the HKCC against a particular industry or class of agreements, while that

³ HKLSA believes that the issuance of a non-enforcement letter would not be inconsistent with the position currently set out in paragraph 5.15 of the Guideline, which specifies that the making of a block exemption application does not provide the undertakings concerned with immunity. Interim exemptions would not be granted as a matter of course whenever a block exemption application is made. As discussed below, the HKCC would have the discretion whether or not to grant an interim exemption, taking into account all relevant factors.

industry's application for a permanent block exemption is being reviewed. In the latter case, the HKCC has the inherent authority to issue statements of non-enforcement under its discretion to enforce or not enforce the Ordinance set forth in Parts 3 and 4 of the Ordinance. Such statements have the advantage of being a more informal process that does not impose on the HKCC the relevant obligations in Section 16 of the Ordinance.

Although HKLSA would defer to the HKCC on how best to adopt procedures to allow for the issuance of interim exemption orders (or statements of non-enforcement), HKLSA recommends the following procedure for the HKCC's consideration.

1. As noted above, any industry seeking an interim exemption from the Ordinance would file their complete application for a block exemption pursuant to Section 15 of the Ordinance, and at that time also formally request an interim exemption. Depending on whether the Hong Kong Government implemented Section 15 early (per the proposal set forth above), these applications would be submitted either before or after the substantive provisions of the Ordinance became effective.
2. HKLSA recommends that interim exemptions be for a limited period of time. Specifically, the interim exemption should be for whatever period it takes the HKCC to review the exemption application (which HKLSA discusses in further detail below).
3. If the HKCC is minded to opt for the more formal route and issue an interim block exemption order (rather than the statement of non-enforcement), it could issue public notice of the proposed interim exemption order pursuant to Section 16(3) of the Ordinance, and allow a period of 30 days for public comments. If the HKCC prefers the statement of non-enforcement process, it can issue this statement immediately without the need for public consultation.
4. For interim exemptions to have any value to the applicants in terms of legal certainty, a prompt decision from the HKCC would be critical. With this in mind, requests for interim relief should only be subject to the notice and public review provided for in the Ordinance, not more. In particular, the Ordinance only requires 30 days' public notice and opportunity to comment on the proposed interim exemption order. It does not require notice and comment on the mere submission of a block exemption application, as is proposed in Figure 3 and paragraph 12.1 of the Guideline. Such additional notice should not be required for interim exemption orders.
5. Moreover, although Section 16(3) of the Ordinance states that the period of consultation should be "at least 30 days," HKLSA submits that the HKCC should provide for no more than 30 days' consultation in the case of interim exemptions. HKLSA understands and agrees that transparency and public consultation are both important policy objectives. However, such considerations must be balanced against the need for certainty and timeliness. The Legislative Council in passing the Ordinance determined that, for block exemptions, consultation of only the

proposed exemption order would be sufficient. There has been no showing why an additional notice and comment period is needed above and beyond that prescribed by the Legislative Council. This is particularly true in the case of interim exemptions which, by their very nature, demand prompt action if they are to be of any value.

HKLSA further submits that the same principle applies to exemption requests in general. Again, the single notice and comment period prescribed by the Ordinance should be sufficient to fulfill the HKCC's statutory review obligations. At most, the additional notice and comment period proposed in the Guideline should be available to the HKCC at its option only if it determines additional comment would be necessary. It should not be mandatory as a matter of course.

The HKCC states in paragraph 11.3 of the Guideline that block exemptions "should be seen as an exceptional measure." HKLSA agrees, but this should not be construed to mean that block exemptions are never appropriate. To the contrary, the fact that an industry has traditionally been granted competition law exemptions under many countries' competition laws, as is the case in liner shipping, should be accorded considerable weight in the HKCC's consideration of a request for the block exemption. That same principle should apply to the consideration of an interim exemption.

In this regard, HKLSA submits that the following are situations in which interim exemptions (or statements of non-enforcement) should be seriously considered: (1) a particular class of agreements has been operating in Hong Kong for a considerable period of time prior to the implementation of the Ordinance; (2) where interim relief is necessary for Hong Kong to comply with international obligations, or where there is international precedent in comparable jurisdictions for the granting of block exemptions of the type being applied for in Hong Kong; (3) the agreements in question are an integral part of the prevailing business model of the industry or undertakings in question; and/or (4) where there is otherwise an initial finding by the HKCC of a reasonable likelihood that a permanent block exemption order would likely be issued, under the criteria set forth in Schedule 1 of the Ordinance.

Exemption Decisions Should be Determined Promptly

HKLSA urges the HKCC to process block exemption applications as quickly as possible. As the HKCC correctly notes in paragraph 11.8 of the Guideline, "the Ordinance does not provide any timeframe for the HKCC's review of a Block Exemption Application or prescribe any deadline for making a Block Exemption Order".

HKLSA notes that paragraph 11.5 of the Guideline further states, "in jurisdictions which provide for a block exemption regime similar to the regime under the Ordinance, it is not unusual for the process leading to the issue of a block exemption to take several years." HKLSA strongly urges the HKCC to avoid such lengthy consideration to the extent possible. As discussed above, industries such as liner shipping need as much legal certainty as possible before the Ordinance is effective in order to make strategic investment decisions, which will involve substantial sums and – crucially – significantly affect the Hong Kong economy. Without that legal certainty,

decisions could be made that have serious adverse effects on Hong Kong. Thus, particularly absent any procedures which establish interim relief as proposed above, HKLSA believes that it would be beneficial to both the industries seeking an exemption and to the wider Hong Kong economy that the HKCC seek to evaluate block exemption applications as quickly as possible.

Another reason the HKCC should seek to review and decide on these applications as quickly as possible is demonstrated by the very standards for block exemptions set forth in Schedule 1. The purpose of the block exemption process is to provide legal certainty to agreements that contribute to “improving production or distribution” or “promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit,” and make sure these agreements are not thwarted or otherwise chilled by the Ordinance. Put differently, the HKCC has the ability to confirm that certain classes of agreements that provide economic efficiencies and other competitive benefits to consumers in Hong Kong should continue to be able to operate by issuing a block exemption. As discussed herein, block exemptions provide the legal certainty to some industries that a self-assessment approach is unable to provide. This being the case, the HKCC should seek to determine which industries and which classes of agreements are eligible for a block exemption as quickly as possible, to give certainty to those parties and ultimately to benefit Hong Kong as a whole.

On this point, a summary of the exemption process in the United States may be instructive. Competition law immunity for ocean carrier agreements in the United States has existed for many years. In the United States, cooperative liner shipping agreements are required to be filed with the U.S. Federal Maritime Commission (“FMC”). Most agreements are subject to an initial review period of 45 days. During this time, public notice of the filed agreement and opportunity to comment are provided. After 45 days, if the FMC has not acted on the filed agreement, it becomes effective automatically under the U.S. Shipping Act and receives antitrust immunity. Before the 45-day review period expires, the FMC has the authority to formally request additional information from the parties about the filed agreement. If the FMC opts to do so, then another 45-day review period commences as soon as the parties respond to the FMC’s request for additional information.

As the HKCC can see, this process provides for transparency to the public of all agreements seeking competition law exemptions in the United States, but at the same time provides the FMC with adequate time and resources to evaluate the parties’ request for an exemption. The maximum time for review is 90 days plus whatever time the parties take to respond to a request for additional information (usually no more than a few weeks). By limiting the review period to no more than a few months (as opposed to a few years, as the HKCC has suggested might be the case for reviews of block exemption applications in Hong Kong), the U.S. Congress sought to strike a reasonable compromise between the importance of transparency and government oversight, and the industry’s need for prompt regulatory action.

The HKCC should seek to strike a similar balance in Hong Kong. One method to do so would be to set an indicative time limit for the review and issuance of decisions on block exemption applications. As noted above, there is nothing in the Ordinance that precludes the HKCC from establishing an indicative time frame in which to evaluate block exemption applications. HKLSA recommends that the HKCC works towards an indicative review period of

12 months from when block exemption applications are submitted for the HKCC to decide such applications. HKLSA believes that a 12 month period allows for the HKCC to make a timely, yet still fully considered, decision on block exemption applications. HKLSA further submits that if an application has not been decided upon by 9 months from the date it is filed, the HKCC should establish a procedure where it will meet with the applicant to discuss any remaining issues and to advise the applicants of the HKCC's expected timeframe for a decision.

Ultimately, HKLSA submits that establishing a reasonable time period for review of block exemption applications, rather than the HKCC's proposal of "several years", will ensure that Hong Kong consumers and the wider economy will continue to benefit from agreements that serve Hong Kong's public interest and promote economic and efficiency enhancing benefits after the Ordinance goes into effect.

**The Duration of Exemption
Should Generally Be the Full Five Years Before Review**

Most international exemptions for carrier agreements are indefinite (i.e., without any set term), but provide the regulator with the authority to modify or cancel the exemption at any time in the event of any perceived abuse or anti-competitive effects. The countries that have set terms for their carrier exemptions generally provide for at least five year durations (e.g., Singapore, EU), which provides a period of legal certainty for the industry, and a reasonable time for the regulator to evaluate the exemption. The reason that most countries' shipping exemptions are long-term is because the need for and benefits of the exemption are likewise long-term. As noted above, ocean carriers must be able to make long-term plans and significant investments in services, vessels and related infrastructure. Thus, longer-term competition law exemptions help provide legal certainty and stability to encourage this type of investment, which benefits both the industry and the wider economy.

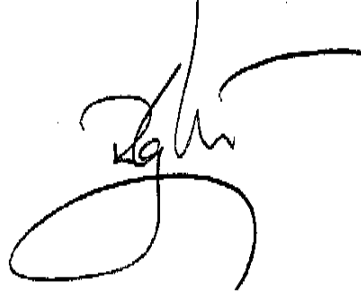
The Guideline is silent on the duration of block exemption orders, although HKLSA notes that Section 15(4) of the Ordinance requires that the HKCC review block exemptions no later than five years after issuance. After review, such exemptions can be varied or revoked as the HKCC deems necessary. Although the Ordinance gives the HKCC some discretion in this regard, in most cases the HKCC should opt for reviewing block exemptions no less than five years before undertaking a review. A five year period would provide the HKCC with a sufficient period of time in which to meaningfully monitor and review the experience under the particular exemption.

HKLSA therefore urges the HKCC to clarify in the Guideline: (1) that the date of review will be set so that it takes place only after sufficient time has passed to enable a meaningful assessment of the block exemption; and (2) absent strong reasons, the duration of the block exemption will be for the full five years before the review.

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HKLSA appreciates the opportunity to provide the above comments to the HKCC, and remains available to provide any additional comments or to participate in any further consultations that would be helpful to the HKCC.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. Giannetta', with a large, sweeping flourish at the bottom.

Roberto Giannetta
Secretary General
Hong Kong Liner Shipping Association

Attachment A:
The Hong Kong Liner Shipping Association Membership

1. APL Co. Pte Ltd
2. CMA CGM (HK) Limited
3. COSCO Container Line Agencies Ltd.
4. Eastern Worldwide Co., Ltd.
5. Emirates Shipping (Hong Kong) Limited
6. Evergreen Star Hong Kong Ltd.
7. Hamburg Sud Hong Kong Ltd.
8. Hanjin Shipping Co., Ltd.
9. Hapag-Lloyd (China) Ltd.
10. Hyundai Merchant Marine (Hong Kong) Ltd.
11. "K" Line (Hong Kong) Ltd.
12. Maersk Hong Kong Ltd.
13. Mitsui O.S.K. Line (H.K.) Ltd.
14. N.Y.K. Line (H.K.) Ltd.
15. OOCL (H.K.) Ltd.
16. United Arab Shipping Agency Co. (HK) Ltd.
17. Wan Hai Lines (H.K.) Ltd.
18. Yangming Marine Transport Corporation