



02/02/2007 15:33

To <competition@edlb.gov.hk>

cc

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Subject Public Consultation on the Way Forward for Hong Kong's Competition Policy

Urgent Return receipt Sign Encrypt

Dear Sir,

On 6 November, the HK Government issued a document on Promoting Competition - Maintaining Our Economic Drive . Members of the public were offered an opportunity to comment to this paper . Attached please find the comments and views of the Hong Kong Liner Shipping Association .

The HKLSA represents a majority of the container liner companies in Hong Kong - many of whom are members of other industry associations as well as trade agreements and conferences covering Hong Kong (e.g. TSA, FEFC, IADA, etc). Rather than respond to the Government's invitation with numerous submissions from individual carriers, individual trade agreements and individual trade conferences, the shipping lines have adopted a more efficient approach of submitting one set of comments which would be backed by all individual shipping members of the HKLSA as well as the individual trade agreements and conferences in which those individual members participate in . We hope, in this case, that the HK Government would accept the attached document as the liner industry's common position with regards to the paper and respective questions raised on the issue of competition .

Should the attached elicit any comments or queries, please do not hesitate to let me know . Indeed, we would welcome an opportunity for a face-to-face discussion with EDLB to discuss this matter . In this context, the HKLSA is prepared to meet you at your convenience .

Sincerely,

Roberto Giannetta
on behalf of the HKLSA

Comments from Hong Kong Liner Shipping Association (HKLSA) On Hong Kong's Competition Policy

Members of the Hong Kong Liner Shipping Association (HKLSA) respectfully submit their comments to assist the HKSAR Government in developing a competition policy that would support continuous growth of the Hong Kong economy at large, and the liner shipping industry in particular.

The HKLSA, established in 1981, has come to be recognized as the main voice of liner shipping in Hong Kong. Representing some 85% to 90% of the containerized liner industry in Hong Kong, HKLSA is very active in policy matters by occupying a dedicated seat on various Government committees and service industry institutions. Although HKLSA is not a commercial entity, the Association does have potential and direct influence on commercial matters which impact every shipping line operating in Hong Kong. Besides having a stake in policy matters and in commercial matters, the HKLSA also has direct influence on logistical and operation matters as shipping lines seek to provide a high quality service, which is vital in the economic growth of Hong Kong.

In the Competition Policy Public Discussion Document released in November 2006, the Government raised twenty key questions regarding future competition policy in Hong Kong, and asked interested parties to comment on the various issues presented by these questions. HKLSA's comments below do not speak to Question 1—whether Hong Kong needs one comprehensive competition law. Although HKLSA members have operated in a highly competitive environment for many years in the Hong Kong trades, and have successfully achieved several important benefits of ocean carrier services to the Hong Kong trading community under the current system, we believe this question is best left for other parties to address. Instead, HKLSA's comments focus specifically on Question 7—whether any new competition law should allow for exclusions or exemptions, and if so, in what circumstances should such exemptions apply. As HKLSA sets forth in detail below, should the Government choose to adopt a single, comprehensive competition law in Hong Kong, the only way to ensure that all of the benefits of ocean carrier services achieved under the current system remain would be for Hong Kong to adopt a block exemption from the competition law for liner shipping services.

1. The Liner Shipping Industry is Essential to the Hong Kong Economy

Liner Shipping is a major industry in the Hong Kong Economy. There are at present some 50 major shipping lines offering 380 port calls in Hong Kong every week. As the major gateway for the vast hinterland of China the port of Hong Kong over the past decade has positioned itself at the top of the mega world container port league, handling an annual container throughput exceeding 20 million twenty-foot equivalent units ("TEUs"). Together with associated shore-side transportation operators, the industry employs over one-quarter of the work force in Hong Kong. This significant

achievement in itself is evidence that the competitive environment currently existing in Hong Kong allows business to flourish and prosper. It is vitally important, therefore, that a free flow of trade must be maintained, and Government intervention be kept at a tolerable level, to provide confidence for the continuous injection of investment to enable this important industry to move forward. To promote business certainty, it is also essential that Hong Kong's treatment of liner shipping agreements be consistent with that of Hong Kong's major trading partners.

2. Antitrust Immunity is Necessary to Ensure International Comity.

Liner shipping is, by definition, an international business. As such, it is governed by the laws of several nations. Many countries throughout the world have antitrust immunity systems in place for liner shipping agreements, such as Singapore, the United States, Canada, Australia, Japan, Korea, and others. Cooperative liner shipping agreements operate in virtually all shipping trades worldwide. If Hong Kong adopts a competition law, HKLSA urges adoption of a block exemption for liner shipping similar to that recently issued in other similarly situated countries (e.g. Singapore). Having different standards among different countries would ultimately lead to inefficiency, uncertainty, and a substantial increase in the cost of doing business. It would therefore jeopardize shipping companies' ability to provide quality, cost-effective service to their customers. Additionally, standards in different countries would have a negative impact on carriers' agreements, requiring them to expose themselves to legal risk in one jurisdiction in order to comply with the legal requirements of another.

Singapore is the most recent country to have adopted an antitrust immunity system for the liner shipping industry. Singapore adopted a comprehensive competition law that went into effect in January of 2005, with most of its key provisions becoming effective in January of 2006. This past year, the Competition Commission of Singapore ("CCS") issued a block exemption order to exempt liner shipping agreements from antitrust prohibitions in the Singapore Competition Act, provided those agreements fulfill certain filing obligations. The CCS recognized that antitrust immunity has long been a feature of the liner shipping industry in countries all over the world. The CCS promulgated the antitrust immunity for carrier agreements because it believed it would maintain the stability of prices and the availability of reliable services, and would facilitate efficiency by way of technical and operational cooperation among liner shipping companies.

Moreover, given the presence of a large number of major shipping companies in Singapore, along with Singapore's extensive network of liner shipping connections, the CCS stated that the antitrust immunity provided to carriers' agreements will benefit the Singapore economy as well as provide competitive, comprehensive, and low-priced shipping services for shippers throughout the region. Finally, the CCS recognized that shipping is a global trade that exists in an international regulatory environment, and felt it was important to align Singapore with the same regulatory

framework that currently exists in the U.S., Australia, and Japan. The block exemption order in Singapore will continue in force through December of 2010. It is also worthwhile to mention that Singapore operates an efficient container port similar to that of Hong Kong's, and is actively competing for the position as a dominant transshipment hub in the Asia region. For Hong Kong to adopt a more restrictive competition policy than Singapore would seriously impair the competitiveness of Hong Kong and would undermine the ability of Hong Kong to maintain its status as the leading liner shipping centre of Asia.

In the United States, limited antitrust immunity for carrier agreements has existed since 1916, and was comprehensively reviewed by the U.S. Congress in 1998, resulting in the enactment of the Ocean Shipping Reform Act of 1998 ("OSRA"). In the U.S., rate discussion agreements, conferences, vessel sharing agreements, and other types of liner shipping cooperative arrangements receive antitrust immunity as long as they file their agreements with the Federal Maritime Commission ("FMC"). The FMC may delay or prevent the effectiveness of any agreement it deems necessary to protect competition in the U.S. The system in the U.S. was a carefully crafted compromise that has had the support of both carriers and shippers alike, and the shipping industry as a whole continue to believe that this system is working remarkably well.

Canada also has an antitrust immunity system in place for liner shipping that is very similar to the U.S. The Shipping Conferences Exemption Act of 1987, as amended, which is administered by the Canadian Transportation Agency, provides that the provisions of the Competition Act in Canada do not apply to liner shipping conference agreements.

Similarly, in August of 2006, the Australian government announced that it would retain its exemption for liner shipping set forth in Part X of the Trade Practices Act, permitting liner conferences and vessel sharing agreements to continue in Australia.

The only exception to this recent trend is the European Union's decision to repeal its block exemption for liner conferences from the European competition laws effective in October of 2008. The exact status of permitted cooperative liner activities, however, is yet to be finalized. Since the EU's actions are inconsistent with many other jurisdictions, and because it is not yet clear how the system in the EU will operate in the future, the EU should not be used a model for Hong Kong's treatment of carrier agreements.

Antitrust immunity for liner shipping agreements has proven to work very well in the international ocean commerce of every major trading nation for many decades. Should Hong Kong choose to adopt a comprehensive competition law, it should follow the example of all of these countries and ensure that an antitrust immunity system, compatible with virtually all of its major trading partners, is in place for the liner shipping industry.

3. Antitrust Immunity is Essential to the International Liner Shipping Industry

Antitrust immunity for liner shipping agreements is the most appropriate and effective method for addressing the unique circumstances in the liner shipping industry. There are several reasons why this is so.

First, ocean shipping is a capital intensive industry. The time lag between placing an order for a vessel and delivery from the shipyard averages three years. Maintaining a regular, weekly schedule on a given route requires that a number of vessels be committed to that service. That means a huge capital commitment in vessel assets alone, plus even more in shore-side terminal and intermodal infrastructure costs. Equipment and assets such as ships and port facilities take years to design and build, and require long-term financing and asset sharing commitments to maintain.

Against this background of high capital costs, there are unique supply and demand patterns under which the liner shipping industry operates. On the supply side, carriers must employ a certain minimum number of vessels on a given route if they are to be able to provide the regular, fixed day sailing schedules on which Hong Kong shippers rely, and on which the Hong Kong import and export markets depend. Furthermore, those vessels must be of a size that can accommodate the anticipated peak demand on that route. If capacity is not available, vessels may have no means of moving cargoes that are essential to Hong Kong importers and exporters. The combination of the requirements of regular schedules and adequate capacity to meet peak demand results in a supply of vessel capacity that is relatively inelastic.

In contrast, demand for ocean transportation varies by season, by direction, and by business cycles. Actual demand at any given time is often below the peak level capacity around which liner services are structured. This structural overcapacity causes market instability because it induces liner companies to try to fill the inevitable empty space on the theory that some revenue is better than none. Rates for all the space on the vessel are thus driven down towards marginal costs. Pricing at marginal costs in turn results in rates that do not return enough revenue to support the massive capital investments needed to maintain a modern container fleet in the long term.

The high capital costs and structural overcapacity unique to the liner shipping industry is why antitrust immunity is so essential. There must be a mechanism for tempering the intense pressure on carriers to lower prices below compensatory levels. An antitrust immunity system, such as the current regimes in Singapore, the United States, and Australia, avoids “destructive competition” among carriers by allowing carriers to discuss and agree upon rate guidelines that moderate the tendency toward rates that do not cover full costs. Additionally, the combination of tools that are allowed by carrier agreements—information exchange, market analysis, rate discussions, trade condition discussions, and pricing strategy discussion—provides carriers a means of justifying the tremendous investments of capital that are necessary

to maintain and expand capacity and services in this industry. Without that incentive to invest in infrastructure, creation of new capacity could wait until demand exceeded existing capacity. That circumstance would restrict Hong Kong trade for extended periods of time and negatively affect the entire Hong Kong economy.

Antitrust immunity also has an important application beyond carrier rate agreements. Certain operational agreements, such as rationalization agreements, vessel sharing agreements, and space charter agreements, allow carriers to coordinate vessel services and/or exchange vessel space. These agreements have greatly expanded the service options available to the shippers and have promoted efficiencies and cost savings for carriers by reducing unused space on vessels. These important agreements would be impossible without immunity from the antitrust laws.

As a result of generally recognized antitrust immunity for carriers' rate and operational agreements, carriers are able to provide stable services and prices in an efficient manner, while shippers today have available to them more sailings—to more ports—on newer ships—at lower rates—than ever before. This is why antitrust immunity is so essential for the entire industry.

4. Significant Change To The Current System in Hong Kong Carries Serious Risks

Hong Kong does not currently have a comprehensive competition statute. However, since 1998 the government has promulgated a number of policy statements, guidelines, and reports aimed at maintaining a competitive environment and eliminating anti-competitive practices in Hong Kong. Under the current system, liner shipping companies have been able to form conferences, rate discussion agreements, and operational discussion agreements. These agreements have operated for decades in the Hong Kong trades, and continue under the recent policy statements. As such, the most important benefits of ocean carrier services to the Hong Kong trading community have been successfully achieved: carrier services have grown to meet trade needs; reinvestment in ships and shore-side facilities has continued at a high level; shippers have many choices of quality carriers offering highly competitive services in all major trades; and costs to consumers have remained at very reasonable levels.

Indeed, the current system has done a remarkable job in encouraging huge investment by the liner shipping industry to meet the unexpected high increase or reductions in demand, accommodate sudden shifts in cargo routings, and the need for ongoing significant investment in ships, equipment, shore-side facilities, and information systems. The existing system has achieved unprecedented efficiencies and innovation in moving cargo on intermodal transport in ocean trades. Additionally, the existing system meets all the needs of Hong Kong's major trading partners.

There is a history of many years to confirm the effectiveness of the current system. As a result, should Hong Kong choose to adopt a comprehensive competition law, the

only way to fully ensure that all the benefits of the current system remain would be for Hong Kong to adopt an antitrust immunity system for liner shipping services.

In conclusion, HKLSA strongly believes that an appropriate competition policy is one that should facilitate and promote international trade, on which the success of the Hong Kong economy relies, rather than inhibit it from the prospective of a rigid and over-regulatory regime.

At the end of the day, the shipping lines in Hong Kong must be responsive to their users' needs – efficiency in service, stable pricing structures, abbreviated cost recoveries and diversity of options. As shown above, these needs have been effectively met under the current system in Hong Kong. Only by preserving and safeguarding the ability of the shipping lines to continue to operate as they do today can Hong Kong shipping companies best meet their users' needs.

Therefore, should Hong Kong choose to adopt a comprehensive competition law, HKLSA believes that there must be an antitrust immunity system in place to allow liner shipping services to move forward in meeting Hong Kong dynamic commercial and operational needs.

Dated at Hong Kong 2nd February 2007