

GUIDANCE NOTE REGARDING THE PROVISIONS OF THE COMPETITION (BLOCK EXEMPTION FOR VESSEL SHARING AGREEMENTS) ORDER 2017

(version of 7 July 2022, updated to reflect the Competition (Block Exemption for Vessel Sharing Agreements) (Variation) Order 2022)

1. This Guidance Note provides a summary and explanation of the provisions of the Competition (Block Exemption for Vessel Sharing Agreements) Order 2017 (“**Order**”), as varied by the Competition (Block Exemption for Vessel Sharing Agreements) (Variation) Order 2022. In accordance with section 34 of the Competition Ordinance (Cap 619) (“**Ordinance**”), the Order is published in the Commission’s Register of Decisions and Block Exemption Orders. This Guidance Note is provided for reference only and does not form part of the Register of Decisions and Block Exemption Orders.

2. For further background to the Order, parties may wish to refer to the Commission’s Statement of Reasons of 8 August 2017. This provides an explanation of the application for a block exemption order which was received from the Hong Kong Liner Shipping Association and the Commission’s decision to issue a block exemption order in respect of vessel sharing agreements (“**VSAs**”). In addition, parties may refer to the Commission’s Notice of Variation of 7 July 2022 for more information about the review of the Order conducted between 2021 and 2022, and the basis for varying the Order.

Overall approach

3. The Order sets out a number of specific activities carried out in VSAs which the Commission considers should benefit from a block exemption. The Order also contains certain conditions, including a market share limit and a list of non-exempt activities, to which the exemption would be subject. Other provisions relate to the commencement, term and review of the Order and the definitions used in the Order.

Commencement, review and duration

4. Paragraph (1) specifies the date on which the Order enters into force, which is the date of the publication of the Order in the Register of Decisions and Block Exemption Orders.

5. Paragraphs (2) and (3) deal with the review of the Order by the Commission:

- (a) In accordance with sections 15(4) and 19(1) of the Ordinance, the Commission must commence a review of the block exemption order on a date to be specified

in the order, which may not be more than five years after the date of the order. Under paragraph (2), the Commission will commence a review of the Order within four years of the commencement date of the Order, and a further review of the Order within three years thereafter.

- (b) In addition, section 19(2) of the Ordinance permits the Commission to commence a review of a block exemption order at any time it considers appropriate. When considering whether or not to conduct a review of block exemption order under section 19(2), the Commission must take account of the list of matters specified in section 19(3) of the Ordinance. The Commission has therefore made provision for the section 19(2) review mechanism in paragraph (3) of the Order.

6. Section 15(3)(b) of the Ordinance provides the Commission with the discretion to specify a date from which a block exemption order is to cease to have effect. Under paragraph (4), the Order will continue in force until 8 August 2026, unless the Commission decides to vary or revoke the Order at an earlier time in accordance with section 20 of the Ordinance.

Definitions

7. Paragraph (5) sets out the defined terms which are used in the Order.

8. With respect to the definition for ‘liner shipping services’, the Order excludes services relating to the ‘inland carriage of goods occurring as part of through transport’ from the definition. This means that any VSA-related arrangements between carriers regarding such services are not covered by the Order. Though some VSAs do contain authorities for the members to jointly negotiate and procure inland services in varying degrees, the Commission understands that this authority has not been utilised by most VSAs to date other than with respect to terminals and stevedoring. The Commission considers that the latter ‘dockside’ activities form part of the provision of liner shipping services, and thus would not be excluded from the Order as involving the ‘inland carriage of goods’. Such activities could be considered to fall within the scope of paragraph (6)(c) of the Order (i.e., ‘the joint operation or use of port terminals and related services’).

9. The Order does not limit the definition of ‘liner shipping services’ to the carriage of a particular type or types of cargo. In this respect, the Commission notes that VSAs may cover cargo carried in both containerised and non-containerised form (i.e. break-bulk cargo).

10. The definition of ‘transport user’ is intended to cover all customers of liner shipping services, including shippers, consignees, freight forwarders and logistics companies.

11. Finally, with respect to ‘vessel sharing agreements’, the Order defines such agreements in broad terms, in order to cover the varying forms of cooperation which VSAs may take. It is intended that consortia, slot exchange agreements, slot charter agreements, joint service agreements, slot swap agreements and ‘alliances’ or ‘strategic alliances’ all constitute ‘vessel sharing agreements’ for the purposes of the Order.

Excluded agreements

12. Paragraph (6) sets out the specific VSA activities which benefit from the block exemption under the Order (i.e., the activities that may be considered to be ‘excluded agreements’ for the purposes of section 15 of the Ordinance). The list of activities provided largely corresponds to that in Article 3 of the European Commission’s block exemption regulation for consortia.¹

13. Paragraph (6)(a) covers the joint operation of liner shipping services and provides a non-exhaustive list of exempted activities in this area. Paragraph (6)(b) refers to capacity adjustments in response to fluctuations in supply and demand (which may be considered necessary for the effective operation of a joint service), while paragraph (6)(c) refers to the joint operation or use of port terminals and related services.

14. By virtue of paragraph (6)(d), activities which are ancillary to those in sub-sub-paragraphs (a), (b) and (c) and necessary for their implementation would also be treated as excluded agreements under the Order. For example, this could include ‘rights of first refusal’ (i.e. restrictions on the extent to which VSA members can sell vessel space to or obtain vessel space from non-VSA members), if such restrictions were necessary for the implementation of the VSA.

Conditions

15. Paragraph (7) sets out certain conditions which a VSA would need to fulfil in order to benefit from the block exemption in paragraph (6). In this respect, section 15(3)(a) of the Ordinance envisages that the Commission may, in a block exemption order, impose conditions or limitations subject to which the block exemption order is to have effect.

16. In particular:

- (a) Paragraph (7)(a) provides that parties must not exceed the market share limit (see further paragraphs 17 to 21 of this Guidance Note).

¹ Commission Regulation 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).

- (b) Paragraph (7)(b) sets out certain activities which, if engaged in in the context of a VSA, prevent the VSA from benefiting from the Order. These are price fixing, price recommendations or the exchange of pricing information, output restrictions other than the capacity adjustments which benefit from the Order by virtue of paragraph (6)(b), and allocation of markets or customers. Such activities have significant potential to harm competition and, in any event, are not considered to form part of the usual cooperation which takes place in the context of VSAs.
- (c) Paragraph (7)(c) provides that each VSA member should be entitled to withdraw from the VSA without financial or other penalty. The withdrawing member may be required to give a particular period of notice before their withdrawal, provided that the period is both agreed between the members and reasonable in the circumstances of the VSA.

Market share limit

17. Paragraph (8) sets out the market share limit which is referred to in paragraph (7) as a condition of the Order.

Formulation of the market share limit

18. The market share limit is formulated as follows:

- (a) The primary market share limit is set out in paragraph (8)(a) and is set at 40%. Subject to paragraph (8)(b) of the Order, parties to a VSA will not benefit from the Order with respect to a particular market where they hold a combined market share of more than 40% in that market.
- (b) Paragraph (8)(b) provides that the primary market share limit in paragraph (8)(a) would be deemed not to be exceeded where parties to a VSA hold a combined market share of not more than 45% for a period of two consecutive years in a particular market. This aims to give parties a degree of flexibility, recognising that shorter term fluctuations in their combined market shares are unlikely to have a significant long term impact on the market.
- (c) Paragraph (8)(c) sets out how market shares should be calculated for the purposes of the market share limit. In particular, parties should refer to the total volume of the goods carried, or the aggregate cargo carrying capacity of the vessels operating in the market, measured in freight tonnes or 20-foot equivalent units. In applying these methods of measurement, all goods carried or vessels operated

by a party in the market should be included, regardless of whether the relevant goods are carried or whether the relevant vessels are deployed in the context of the VSA in question. As long as the combined market share of the parties to the VSA does not exceed the market share limit under either one of the two methods of measurement, the agreement will be considered to be below the market share limit.

Effect of the market share limit

19. It should be noted that the market share limit is intended to set a threshold below which there is a sufficient degree of certainty that the potential competitive harm resulting from VSAs will not outweigh the efficiencies which may arise. If parties to a VSA exceed the market share limit, this would not necessarily mean that the efficiency exclusion does not apply in respect of that VSA and/or that the parties to the VSA are in contravention of the first conduct rule, but merely that the benefit of the Order does not apply. It would be open to the parties to a VSA which exceeds the market share limit, for example, to self-assess whether the VSA meets the terms of the efficiency exclusion or to apply to the Commission for a decision under section 9 of the Ordinance.

Calculation of market shares

20. The Commission does not propose to provide binding rules in a block exemption order or elsewhere on how specific liner shipping markets should be defined for the purposes of calculating market shares. As a general matter, parties should refer to the guidance on market definition in the Commission's *Guideline on the Second Conduct Rule*, and may also consider relevant case law or precedents where appropriate. Ultimately, it is for parties to assess whether their combined market shares exceed the market share limit, and whether the other conditions for exemption in the Order are fulfilled.

21. Nonetheless, the Commission is willing to provide the following indicative guidance as to how it views the market share limit should be approached:

- (a) Where long-distance trades are concerned, the market share limit should generally be applied by reference to the 'trade' between two ranges of ports in different geographic regions (for example, Northern Europe to North America or the Far East to the Mediterranean). Ports within the same region at the end of a single trade may generally be considered as substitutable. This is on the basis that such ports are generally served by a dedicated group of ships and there is the possibility of inland transport or transshipment between ports.

- (b) Where intra-regional trades are concerned, the market share limit should generally be applied by reference to the intra-regional trade in question (for example, the intra-Asia trade).

Other issues

22. For the avoidance of doubt, the Order is without prejudice to the application of the second conduct rule in the Ordinance. Pursuant to section 15 of the Ordinance, a block exemption order only confirms that a particular category of agreement satisfies the exclusion from the first conduct rule for agreements enhancing overall economic efficiency.

23. The Order does not include a filing requirement in respect of VSAs which exceed the market share limit or otherwise.