

**CCS Explanatory Note on the Competition (Block
Exemption for Liner Shipping Agreements) Order
2006**

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INTRODUCTION

1. This note explains the rationale for and the key aspects of the operation of the Competition (Block Exemption for Liner Shipping Agreements) Order 2006 (“BEO”).
2. Section 34 of the Competition Act (Chapter 50B) (“Act”) prohibits agreements, decisions and concerted practices that appreciably prevent, restrict or distort competition in Singapore (“the section 34 prohibition”).
3. An agreement that falls within the scope of the section 34 prohibition may, on balance, have a net economic benefit if it contributes to improving production or distribution or promoting technical or economic progress and does not impose on the undertakings/businesses concerned restrictions, which are not indispensable to the attainment of those objectives or afford the undertakings/businesses concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.¹
4. Section 36 of the Act provides that where the Competition Commission of Singapore (“CCS”) is of the opinion that a particular category of agreements is likely to satisfy such requirements, it may recommend to the Minister for Trade and Industry to make a block exemption order exempting that category of agreements from the section 34 prohibition. Such an exemption is known as a block exemption and it only applies in respect of the section 34 prohibition. It does not apply to conduct amounting to an abuse of dominant position prohibited under section 47 of the Act.
5. This note is not a substitute for the BEO, the Act, the regulations or the orders. It may be revised should the need arise. The examples in this note are for illustration only. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the CCS. Persons in doubt about how they and their commercial activities may be affected by the BEO, the Act, the regulations or the orders may wish to seek legal advice.

¹ Section 41 of the Competition Act

RATIONALE FOR THE BEO

6. Singapore, with its extensive network of liner shipping connections, is one of the premier international maritime centres for liner shipping operations. The presence of a large number of major shipping companies has important flow-through benefits for the Singapore economy as well as providing competitive and comprehensive shipping services for shippers located in Singapore.

7. Exemptions from certain provisions of competition law have long been a feature of the liner industry in major jurisdictions around the world. Concerns about maintaining the stability of prices, the availability of reliable services and facilitating technical and operational cooperation among liner operators have provided the main rationale for the exemption of liner shipping agreements.

8. The exemptions in the European Union and Australia are being currently reviewed and the liner industry may lose its present competition law immunity for conference-type activities in these jurisdictions. This will have implications for liner operators that operate on such routes through Singapore. The nature and timing of such changes in these jurisdictions are uncertain, although some changes are expected within the next 2 years. In addition, it is important to recognize that even if the exemptions are removed in Europe and Australia, there are other trade routes through Singapore which will not be affected by the regulatory developments in these jurisdictions.

9. Shipping is a global trade and the CCS is mindful of the larger regulatory environment within which different stakeholders in the shipping industry operate, as liner operators will generally organize their agreements to comply with the rules of the strictest country on a particular trade route. After due consideration of the nature of the shipping trade, international maritime developments, Singapore's market context and inputs from liner operators and shippers, the CCS is of the view that the BEO will put in place a regulatory environment broadly aligned with that currently in place for major jurisdictions, such as the EU, the United States, Australia and Japan. Such a block exemption will provide certainty to the shipping industry.

10. In designing the BEO, the considerations taken into account by the CCS include: (i) it should be underpinned by a robust competition/economic efficiency framework; ii) it must not place unnecessary administrative burden, such as increased compliance costs, on the industry; and (iii) it should provide sufficient flexibility to respond to international maritime developments.

11. The objectives of the BEO are to ensure that within an overall regulatory environment that promotes and sustains competition in Singapore:

i) agreements which promote the rationalization of liner shipping operations by means of technical, operational and commercial arrangements are facilitated; and

ii) exporters and importers have ongoing access to frequent and reliable liner shipping services at prices that are internationally competitive.

The BEO is therefore important in maintaining Singapore's position as a premier international maritime centre. This objective is consistent with the promotion of economic progress as provided for in section 41 of the Act. Further conditions have been included in the BEO to facilitate competition between parties to a liner shipping agreement, and to limit the extent of anti-competitive behaviour that liner operators can engage in through the liner shipping agreement. This is to ensure that the liner shipping agreements do not impose restrictions which are not indispensable to the attainment of the above objectives of the BEO, and that competition is not eliminated substantially.

12. Section 40 of the Act provides that the CCS may, where appropriate, recommend to the Minister for Trade and Industry to vary or revoke a block exemption order. The CCS will monitor developments in the maritime industry and where necessary, conduct further reviews of the BEO in the future. Any significant changes to the provisions in the BEO will be subject to careful evaluation and to a public consultation process.

APPROACH OF THE BEO

13. Agreements between liner operators may deal with operational aspects or involve discussion on the commercial aspects of liner operations. The BEO will exempt all liner shipping agreements as defined in the BEO from the section 34 prohibition, subject to a list of specified conditions and obligations. Unlike the position in the EU, where there are separate BEOs for liner conferences and for consortia, this approach of having one comprehensive BEO is intended to reduce the potential for disputes over taxonomy as future collaborative arrangements may not fall neatly within the current definition of types of liner agreements, such as conference, consortia and discussion agreements. It will also avoid imposing unnecessary constraints on carriers that wish to innovate on shipping arrangements in ways that have little or no anti-competitive effect. This is consistent with our general regulatory approach of focusing on competitive effects rather than the form of the agreement.

14. The BEO will permit a wide range of liner activities including agreement between the liner operators on detailed capacity decisions and prices subject to certain conditions. This will apply regardless of the market share of the parties to the agreement. Where the aggregate market share of the parties to the agreement exceeds 50 per cent (“market share limit”), the parties to the agreement will need to comply with certain obligations relating to filing of the agreement, publication of information concerning tariffs and the structure and service levels of the liner shipping services under the agreement relevant to the market in which the market share limit is exceeded, and making available documents and details on such matters and other aspects to the Commission.

15. Agreements that meet the conditions set out in the BEO are, prima facie, considered to have met the requirements under section 41 of the Act. The CCS will generally not conduct an examination of such agreements. However, if there has been a breach of any of the condition(s) of the BEO, the exemption with respect to that agreement shall be cancelled from such date as the Commission may specify. Where there has been a failure to comply with any obligation in the BEO, or where the agreement has effects on competition that are incompatible with section 41 of the Act, the Commission may cancel the exemption with respect to that agreement from such date as the Commission may specify.

KEY FEATURES OF THE BEO

Application of the BEO

16. A liner shipping agreement that meets the requirements of the BEO will be exempt from the section 34 prohibition.

General Approach and Structure of the BEO

17. The BEO sets out the date of commencement, duration, definition of terms specific to the BEO, the conditions for exemption, the obligations (where applicable) to be fulfilled for exemption, a grace period for compliance with the obligations and the circumstances which could lead to a cancellation of the exemption in relation to particular liner shipping agreements.

18. A more detailed explanation on the conditions and obligations to be satisfied in order for a liner shipping agreement to qualify for exemption under the BEO is found in the sub-section on exempted agreements below.

Commencement and Duration

19. The BEO will take effect retrospectively from 1 January 2006. Unless varied or revoked in accordance with the Act, the BEO shall continue up to and including 31 December 2010.

Definitions

20. The definition section in paragraph 3 of the BEO deals with specific terms used in the BEO, some of which are often used to describe features of the liner shipping industry. Only the key definitions are summarised here.

Liner shipping agreement

21. A liner shipping agreement is defined in the BEO as an agreement between two or more vessel-operating carriers which provide liner shipping services pursuant to which the parties agree to co-operate in the provision of liner shipping services in respect of one or more of the following: (i) technical, operational or commercial arrangements; (ii) price; (iii) remuneration terms.

Liner shipping services

22. Liner shipping services are defined as the transport of goods on a regular basis on any particular route between ports and in accordance with timetables and

sailing dates advertised in advance and made available, even on an occasional basis, by a liner operator to any transport user against payment. Such services include inland carriage of goods occurring as part of through transport. Bulk and tramp shipping are, in general, due to the nature of such operations, not included in the scope of the BEO.

23. In the event that the parties to a liner shipping agreement, involving for example bulk shipping, that is not exempt under the BEO, believes that their agreement qualifies for the net economic benefit exclusion under the Third Schedule of the Act, the parties may wish to seek guidance or a decision from the CCS by notifying the agreement under section 43 or 44 of the Act.

Through transport

24. Through transport is defined as the continuous transportation by a combination of sea and inland carriage between a point of origin to a destination which is undertaken by a liner operator, and performed by the liner operator undertaking the transportation (i) on its own, (ii) partly on its own and partly through one or more other carriers, or (iii) through one or more other carriers, at least one of which is a liner operator, and for which a single amount is charged by the liner operator undertaking the transportation.

25. The concept of through transport is included to ensure that liner shipping services as defined, will, where relevant, include inland carriage. The CCS agrees with the general view in the industry that “seamless” intermodal systems are the future of the international general cargo industry. Prohibiting carriers from offering through transport could introduce a significant adverse dynamic impact on competition, for example, by slowing or stopping the development of an otherwise efficient integration of systems.

Exempted Agreements

Application to liner shipping agreements in general

26. To qualify for exemption, a liner shipping agreement, regardless of the aggregate market share of the parties to the agreement, must adhere to the conditions in paragraph 5(1) of the BEO. The agreement must allow the parties to the agreement:

- (i) to offer, on the basis of individual confidential contracting, their own service arrangements; and

- (ii) to withdraw from the agreement on giving an agreed period of notice without financial or other penalty² such as, in particular, an obligation to cease providing liner shipping services in a market, whether or not coupled with the condition that such activity may be resumed only after a certain period has elapsed.

and must not require any of the following activities to be undertaken by the liner operators:

- (i) mandatory adherence to a tariff³; and
- (ii) the disclosure, whether to other liner operators or otherwise, of confidential information concerning service arrangements.

27. These conditions have been included in the BEO to facilitate competition between parties to a liner shipping agreement, and limit the extent of anti-competitive behaviour that liner operators can engage in through the liner shipping agreement. These conditions are also consistent with the approach adopted by other major jurisdictions in their exemption of liner shipping agreements from competition law.

Where parties to a liner shipping agreements exceed the market share limit

28. Where the aggregate market share of the parties to a liner shipping agreement exceeds the market share limit set out in paragraph 4 of the BEO, the parties are required to comply with the obligations set out in paragraph 5(2) of the BEO if they wish to enjoy the benefit of the exemption. These are:

- (i) filing their liner shipping agreement and any variations or amendments thereto with the CCS in such mode and manner and within such period of time as the CCS may specify;
- (ii) where any variation or amendment is made to the agreement from time to time after the documents in paragraph (i) are filed, filing such variations or amendments, the liner shipping agreement and all preceding variations or amendments thereto in such mode and manner and within such period of time as the CCS may specify;

² The relevant period is to be agreed between the parties, and is not specified in the BEO.

³ Tariff is defined in the BEO as a list of prices and remuneration terms for which, pursuant to a liner shipping agreement, liner operators agree they may offer liner shipping services to transport users; but does not include prices and remuneration terms under a service arrangement.

- (iii) making available to the CCS upon request documents and details relating to any tariff, the structure and service level, and other aspects of the liner shipping services under the agreement relevant to the market in such mode and manner and within such period of time as the CCS may specify;
- (iv) notifying the CCS of the details of any amendment or variation to the documents and details in paragraph (iii) made from time to time in such mode and manner and within such period of time as the CCS may specify;
- (v) making available to transport users information concerning any tariff and the structure and service level of the liner shipping services under the agreement relevant to the market as the CCS may specify, by allowing for examination of such documents at the offices in Singapore of the parties or their agents, or at a publicly available internet website; and in any event, upon request at a reasonable cost in paper or electronic form; and
- (vi) notifying transport users of the details of any amendment or variation to the information in paragraph (v) made from time to time in such mode and manner and within such period of time as the CCS may specify.

29. These obligations have been included to ensure that transport users and the CCS are kept aware of those liner shipping agreements where the aggregate market share of the parties exceed the market share limit. This is because such agreements could potentially pose greater competition concerns.

30. There is no requirement to file a liner shipping agreement with the CCS or notify the particulars of the liner shipping services under the agreement where the aggregate market share of the parties does not exceed the market share limit. The CCS is of the view that such agreements, provided they fulfil the conditions in paragraph 5(1) of the BEO, pose minimal risks of appreciable adverse effect on competition. This approach will also minimise administrative costs for parties to liner shipping agreements.

Market Definition and Exceeding the Market Share Limit

31. The BEO defines a market as any market for liner shipping services in which the parties to a liner shipping agreement operate under that agreement. The agreement could relate to more than one market.

32. If an agreement relates to more than one market and if the market share limit is exceeded in one market but not in another market covered by the agreement, the agreement will be exempt in the market where the limit is exceeded only if the obligations under paragraph 5(2), in addition to the conditions under

paragraph 5(1) of the BEO, are fulfilled. With regard to the market where the limit is not exceeded, the agreement will be exempt as long as the conditions under paragraph 5(1) of the BEO are satisfied.

33. Under paragraph 4 of the BEO, the parties to a liner shipping agreement do not exceed the market share limit if they hold, in a market, an aggregate market share of not more than 50 per cent calculated by reference to

- (a) the volume of goods carried; or
- (b) the aggregate cargo carrying capacity of the vessels operating in the market measured by freight tonnes or 20-foot equivalent units.

34. The CCS considers that a market share limit of 50% provides reasonable assurance that for agreements where parties hold an aggregate market share below this level, there are sufficient countervailing market forces to offset the potential competition concerns that may arise from such liner shipping agreements. As long as the aggregate market share of the parties to the liner agreement does not exceed the market share limit on either one of the two methods of measurement, the agreement will be considered to be below the market share limit. From a competition perspective, it is likely that in this industry there will be little difference in the use of either measure for calculation of market share.

35. The BEO specifies that parties to a liner shipping agreement shall be deemed not to exceed the market share limit if they hold, in a market, an aggregate market share of not more than 55 per cent for a period of not more than two consecutive calendar years. This provision recognizes that short term fluctuations in the aggregate market share of parties to the liner shipping agreement are unlikely to have a significant long term impact on the market.

36. The definition of market is deliberately broad because the concept of a market for competition analysis differs from the standard commercial understanding of a market. The BEO does not specify how a market will be defined, i.e. the extent or geographic coverage of the market, as guidance has been provided by the CCS earlier on market definition (please refer to the CCS Guideline on Market Definition, December 2005). There is also extensive jurisprudence in the EU⁴ on the definition of markets for liner shipping services to which interested parties may refer. Consistent with its general approach on defining markets in a competition analysis, the CCS will consider generally accepted competition law principles and case law when defining markets on a

⁴ European Commission decisions on maritime transport can be found at <http://europa.eu.int/comm/competition/antitrust/legislation/maritime>.

case-by-case basis. To provide some practical guidance, the definition of markets may include the following geographic definitions:

- With respect to long-distance oceanic trades, the market may be defined as ‘trade’ between broadly defined geographical regions, for example, North Europe and East Asia.
- With respect to regional and feeder trades, the market may be defined as the provision of country-to-country shipping services (for example Singapore/Indonesia or Singapore/Thailand).

37. However, the markets may be wider (or narrower) than these definitions to the extent that either demand or supply side considerations may suggest a wider (or narrower) market. For example, if carriers can readily switch capacity from other regions without significant investment, the relevant market could be much wider than just the current ‘trade’.

38. When dealing with new services, the use of these or similar definitions would greatly reduce the possibility that parties to a liner shipping agreement covering a new service linking a relatively minor port in a partner country to Singapore would breach the market share limit. The CCS is of the view that there will generally be minimal competition concerns regarding service on new or thinly serviced routes unless there is concrete evidence of anti-competitive effects that are likely to be more than transitory.

39. It is for the parties to assess, or to seek legal/expert advice on whether their aggregate market share exceeds the market share limit on both methods of measurements stated in the BEO, and whether the agreement satisfies the conditions and obligations for exemption in the BEO.

Grace Period

40. There will also be a grace period for parties to fulfil the obligations in paragraph 5(2) of the BEO if the market share limit is exceeded (please refer to paragraph 6 of the BEO). This is to ensure that liner operators have a reasonable period of time to fully assess and address the competition law implications in relation to their agreements, and to comply with the obligations in order to continue to benefit from the exemption.

Effectively Permitted Behaviours

41. In summary, the BEO will, in effect, allow parties to liner shipping agreements to discuss and agree on the rationalisation and management of

capacity and prices, subject to conditions and obligations in paragraph 5 of the BEO. Price is defined in the BEO to mean the price for which a liner operator performs or offers to perform liner shipping services. Price includes ancillary charges (including surcharges⁵) for such services as liner operators are allowed to bundle inland haulage services with maritime services as part of through transport. This approach is consistent with regulatory developments in other major jurisdictions, in particular the United States.

42. Practices by liner operators that amount to an abuse of a dominant position are not exempt by the BEO and will be considered by the CCS under section 47 of the Act.

Coverage is not Restricted to the Carriage of Cargo by Container

43. The BEO applies to all forms of liner shipping agreements and is not restricted to liner shipping services in a particular form such as container cargo. This means that exempted liner shipping agreements can also cover carriage of cargo by means other than containers, for example, car carrier services. This approach reflects the view that it is desirable to have a BEO that allows liner operators participating in all forms of liner shipping to collaborate to bring about technical, operational and commercial improvements in their services.

Cancellation of the Exemption

44. Paragraph 7 of the BEO provides for the cancellation of the block exemption in respect of a liner shipping agreement. This is in line with the provisions of section 37(2) of the Act.

45. With reference to paragraph 7(2)(b) of the BEO, an example of a situation where an agreement would have effects incompatible with the provisions of section 41 of the Act would be concerted behaviour (including tacit concerted behaviour) by the parties to an agreement whereby they effectively disclose confidential information. To elaborate, individual voluntary disclosure of confidential information on service arrangements is allowed under the BEO, as this is not considered likely to have an appreciable anti-competitive effect. However, concerted behaviour including tacit behaviour that effectively amounts to disclosure of confidential information on service arrangements could

⁵ Ancillary charges represent the additional increase in charges that are triggered by or associated with the operation of moving containers, i.e. they are ancillary to the service provided by liner operators. They include extra charges such as: terminal handling charges; demurrage costs; change of destination; special equipment and charges based on the nature of the cargo (dangerous, obnoxious, refrigerated etc.) Surcharges, on the other hand, describe those charges that are meant to cover *uncertainties*, such as the Bunker Adjustment Factor, Currency Adjustment Factor, Congestion Surcharges and War Risk Surcharge.

substantially reduce the scope of independent contracting and pricing behaviour. This is contrary to the intention of the condition for exemption in paragraph 5 (1)(c)(ii) of the BEO, which provides that the liner shipping agreement must not require disclosure of confidential information concerning service arrangements.

46. If the CCS has cause to be concerned about behaviour of this or other nature producing adverse effects on competition, it may, in accordance with paragraph 7(2)(b) of the BEO, cancel the exemption for the particular liner shipping agreement on the ground that the agreement/concerted behaviour is producing effects that are incompatible with section 41 of the Act.

47. Whether or not the parties to a liner shipping agreement exceed the market share limit, the CCS may, where appropriate, request the parties claiming the benefit of exemption, to demonstrate that the provisions of the BEO are satisfied, and/or to produce a copy of the agreement and any other documents and details relating to the provision of liner shipping services for inspection. The CCS is likely to make such request if there are concerns arising of appreciable anti-competitive effects. The CCS may proceed to cancel the exemption, if necessary.

Cancellation Procedure

48. If the CCS proposes to make a decision for or in relation to the cancellation of the block exemption in respect of a liner shipping agreement (“cancellation decision”), it must give the persons whom the CCS considers are or were party to the agreement, a written notice setting out the facts on which the CCS relies and its reasons for the proposed cancellation decision. Such persons will be given an opportunity to make written representations to the CCS and to request in their written representations for an opportunity to make oral representations. Such persons will also be given a reasonable opportunity to inspect the relevant documents, save for internal documents and confidential information, in the CCS’ file.

49. When the CCS makes a cancellation decision, it will set out the facts on which the CCS relies and its reasons for making the decision. This cancellation decision will be published on a register on the CCS’ website.

Appeals

50. A cancellation decision may be appealed to the Competition Appeal Board. Such an appeal must be brought within the specified time period.