

CCCS EXPLANATORY NOTE ON THE BLOCK EXEMPTION FOR LINER SHIPPING AGREEMENTS



Introduction

1. This note explains the key features of the Competition (Block Exemption for Liner Shipping Agreements) Order (the “BEO”), which exempts liner shipping agreements from section 34 of the Competition Act (Cap. 50B) (the “Act”) until 31 December 2020 under specified conditions and obligations. Section 34 of the Act prohibits agreements, decisions and concerted practices that have as their object or effect the prevention, restriction or distortion of competition in Singapore (the “section 34 prohibition”).
2. Section 36 of the Act provides that where the Competition and Consumer Commission of Singapore (“CCCS”) is of the opinion that a particular category of agreements is likely to satisfy such requirements, it may recommend that the Minister for Trade and Industry make an 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.
3. The criteria for block exemptions are set out under section 41 of the Act, which states that a category of agreements that fall within the scope of the section 34 prohibition may, on balance, have net economic benefits if they contribute to improving production or distribution or promoting technical or economic progress, and do 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.
4. 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 CCCS. 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.

Approach of the BEO

5. Agreements between liner operators may deal with operational aspects or involve discussion on the commercial aspects of liner operations. The BEO exempts all liner shipping agreements as defined in the BEO from the section 34 prohibition, subject to a list of specified conditions and obligations.
6. The BEO permits a wide range of liner activities including agreement between the liner operators on detailed capacity decisions and prices subject to certain conditions. The BEO applies regardless of the market share of the parties to the

agreement. Where the aggregate market share¹ of the parties to the agreement exceeds 50 per cent² (“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 CCCS.

7. 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. CCCS 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 CCCS 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, CCCS may cancel the exemption with respect to that agreement from such date as CCCS may specify.

Key Features of the BEO

Application of the BEO

8. A liner shipping agreement that meets the requirements of the BEO is exempt from the section 34 prohibition. The BEO effectively allows parties to liner shipping agreements to discuss and agree on the rationalisation and management of capacity and prices, subject to certain conditions and obligations.
9. 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.
10. Practices by liner operators that amount to an abuse of a dominant position are not exempt and will be considered by CCCS under section 47 of the Act.

Commencement and Duration

11. The Competition (Block Exemption for Liner Shipping Agreements) (Amendment) Order is in effect until 31 December 2020.

1 Calculated by reference to either: (i) the volume of goods carried; or (ii) the aggregate cargo carrying capacity of the vessels operating in the market, measured by freight tonnes or 20-foot equivalent units.

2 The 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% for a period of not more than two consecutive calendar years.

Definitions

Liner operator

12. A liner operator is an undertaking which (i) provides liner shipping services and (ii) is a party to a liner shipping agreement.

Liner shipping services

13. Liner shipping services means 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.

Liner shipping agreement

14. A liner shipping agreement is 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 agreements; (ii) price; (iii) remuneration terms.

Market

15. A market means any market for liner shipping services in which the parties to a liner shipping agreement operate under the agreement.

Price

16. Price means the price for which a liner operator performs or offers to perform liner shipping services, and includes not only the base freight rate, but also any charge that is incidental to or reasonably connected with the provision of liner shipping services, whether arising by reason of the provision of the liner shipping services or by reason of the occurrence of an uncertainty.

Remuneration Term

17. Remuneration term means any term affecting payment of the amount of the price in relation to the provision of liner shipping services (including a reduction thereof).

Service Arrangement

18. A service arrangement is an agreement concluded between one or more transport users and a liner operator under which, in return for an undertaking from the transport user to commission the transportation of a certain quantity of

goods over a given period of time, a transport user receives an individual undertaking from the liner operator to provide an individualised service of a given quality, specially tailored to the needs of the transport user.

Tariff

19. A tariff refers to 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. A tariff does not include prices and remuneration terms under a service arrangement.

Through transport

20. Through transport means 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; or (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. The concept of through transport is included to ensure that liner shipping services as defined will, where relevant, include inland carriage.

Transport user

21. Transport user means an undertaking which has entered into, or demonstrates an intention to enter into, a contractual or other arrangement with a liner operator for the shipment of goods; or an association of shippers.

Exempted Agreements

Application to liner shipping agreements in general

22. 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 set out under 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;
 - (ii) to withdraw from the agreement on giving any agreed period of notice without financial or other penalty 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

- (iii) the agreement does not require liner operators to mandatorily adhere to a tariff and disclose, whether to other liner operators or otherwise, confidential information concerning service arrangements.
23. 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.

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

24. Where the aggregate market share of the parties to a liner shipping agreement exceeds the market share limit, the parties are required to comply with the obligations as set out under paragraph 5(2) of the BEO if they wish to enjoy the benefit of the exemption. These obligations are:
- (i) filing their liner shipping agreement and any variation or amendment thereto with CCCS in such mode and manner and within such period of time as CCCS may specify;
 - (ii) where any variation or amendment is made to the agreement from time to time subsequent to the filing of the documents referred to in sub-paragraph (i) above, filing such variation or amendment, the liner shipping agreement and all preceding variations or amendments thereto with CCCS in such mode and manner and within such period of time as CCCS may specify;
 - (iii) making available to CCCS 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 CCCS may specify;
 - (iv) notifying CCCS of the details of any variation or amendment made from time to time to the documents and details referred to in sub-paragraph (iii) above, in such mode and manner and within such period of time as CCCS may specify;
 - (v) making available to transport users, and within such period of time as CCCS may specify, information concerning any tariff and the structure and service level of the liner shipping services under the agreement relevant to the market as CCCS 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 variation or amendment made from time to time to the information referred to in subparagraph(v) above, in such mode and manner and within such period of time as CCCS may specify.
- 25. These obligations have been included to ensure that transport users and CCCS are kept aware of those liner shipping agreements where the aggregate market share of the parties exceed the market share limit.
- 26. There is no requirement to file a liner shipping agreement with CCCS 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. CCCS is of the view that such agreements, provided they fulfil the conditions set out under paragraph 5(1) of the BEO, pose minimal risks of appreciable adverse effect on competition.

Market definition and exceeding the market share limit

- 27. 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:
 - (i) the volume of goods carried; or
 - (ii) the aggregate cargo carrying capacity of the vessels operating in the market measured by freight tonnes or 20-foot equivalent units.
- 28. 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.
- 29. 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% for a period of not more than two consecutive calendar years. This provision recognises 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.
- 30. The definition of the market is deliberately broad because the concept of a market for competition analysis differs from the standard commercial understanding of the market. The BEO will not specify how a market will be defined, i.e. the extent or geographic coverage of the market, as guidance has been provided by CCCS on market definition (please refer to the *CCCS Guidelines on Market Definition*). However, consistent with its general

approach on defining markets in a competition analysis, CCCS will consider generally accepted competition law principles and case law when defining markets on a case-by-case basis. To provide some practical guidance, the definition of markets may include the following geographic definitions:

- (i) 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.
 - (ii) 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).
31. 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’.
 32. 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. CCCS 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.
 33. It will be for the parties to assess, or to seek legal/expert advice on whether their aggregate market share exceeds the market share limit, and whether the agreement satisfies the conditions and obligations for exemption under the BEO.

Grace Period

34. A grace period is provided 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).

Coverage is not restricted to the carriage of cargo by container

35. The BEO will apply 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 an exemption 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

36. 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.
37. Where there has been a breach of any condition specified in the BEO, this shall have the effect of cancelling the exemption in respect of that agreement, from such date as CCCS may specify.
38. Where there has been a failure to comply with any obligation specified in the BEO or where CCCS finds in a particular case that the agreement has effects which are incompatible with the provisions of section 41 of the Act, CCCS may cancel the exemption from such date as CCCS may specify.
39. 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. Concerted behaviour, including tacit behaviour, that effectively amounts to disclosure of confidential information on service arrangements could substantially reduce the scope of independent contracting and pricing behaviour. This would be contrary to the intention of the condition for exemption, that the liner shipping agreement must not require disclosure of confidential information concerning service arrangements.
40. Whether or not the parties to a liner shipping agreement exceed the market share limit, the parties claiming the benefit of the exemption shall, upon notice being given by CCCS and within such period of time as may be specified by CCCS, demonstrate that the provisions of the BEO are satisfied.

Cancellation Procedure

41. If CCCS 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”), CCCS shall give notice of this to each person whom CCCS considers is, or was, a party to the agreement. The notice shall contain information referred to in regulation 15(1) of the Competition Regulations 2007. Opportunities for representations and requests for access to file will also be carried out in accordance with regulation 15 of the Competition Regulations 2007.
42. When CCCS has made a cancellation decision, it shall give notice of the decision to each person whom CCCS considers is or was a party to the agreement and such notice will set out the facts on which CCCS bases the

decision and CCCS's reasons for making the decision. This cancellation decision will also be published.

Appeals

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