

Section 57 of the Competition Act (Cap. 50B)

Grounds of Decision issued by the Competition Commission of Singapore

In relation to the Proposed Joint Venture between Nippon Yusen Kabushiki Kaisha (NYK) Ltd. and Mitsui O.S.K. Lines Ltd. and Kawasaki Kisen Kaisha, Ltd.

14 March 2017

Case number: CCS 400/002/17

<p>Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [X<].</p>

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I. Introduction

The Notification

1. On 1 February 2017, Nippon Yusen Kabushiki Kaisha (NYK) Ltd. (“**NYK**”), Mitsui O.S.K. Lines Ltd. (“**MOL**”) and Kawasaki Kisen Kaisha, Ltd (“**KL**”) (collectively, the “**Parties**”), pursuant to section 57 of the Competition Act (Cap. 50B) (“**the Act**”), jointly applied for a decision by the Competition Commission of Singapore (“**CCS**”) as to whether their proposed joint venture will infringe the prohibition in section 54 of the Act if carried into effect.
2. Under the proposed joint venture, the Parties entered into a business integration agreement (“**BIA**”) on 31 October 2016 (“the “**Transaction**”) with the intention to merge their worldwide container shipping business, and their container terminal services business (excluding Japan) (the “**Business**”).¹
3. To assess the Transaction, in addition to conducting a public consultation, CCS also contacted the following third parties:-
 - a. [REDACTED];
 - b. [REDACTED];
 - c. Six (6) vessel operating common carriers (“**VOCCs**”)²;
 - d. Fourteen (14) beneficial cargo owner (“**BCO**”) customers of the Parties³, which includes distributors and manufacturers;
 - e. Four (4) non-vessel operating common carriers (“**NVOCCs**”)/freight forwarders⁴; and
 - f. Four (4) BCO customers.⁵(collectively referred to as “**Third-Parties**”).
4. Of the Third-Parties contacted, thirteen (13) replied, with nine (9) of them providing substantive responses to CCS’s questions.⁶ Of the nine (9) Third-Parties that provided substantive responses to CCS’s questions, seven (7) indicated that they have no competition concerns with the Transaction and did not raise any adverse impact which the Transaction may have on them. The remaining two (2) Third-Parties opined that the Transaction may result in the overall container volume decreasing and higher rates might ensue as current levels are loss making for most VOCCs. One of them also opined that it might face some space and equipment problem in the future, but CCS notes that this Third-Party is using a number of other major liner shipping services providers.

¹ Paragraph 1.1 of the Parties’ response dated 14 February 2017.

² [REDACTED]

³ [REDACTED]

⁴ [REDACTED]

⁵ [REDACTED]

⁶ [REDACTED]

5. At the end of the public consultation process and after assessing the available information, CCS concludes that the Transaction will not infringe section 54 of the Act.

II. The Parties

KL

6. KL is a publicly-listed entity incorporated in Japan and listed on the Tokyo Stock Exchange. KL is the ultimate parent company of 341 subsidiaries and affiliates (the “**KL Group**”).⁷
7. The KL Group is involved in the following categories of business activities worldwide: container ship services, dry bulk transport, car carriers, liquefied natural gas (“**LNG**”) carriers, tanker transport, energy development services, heavy lifters, terminal operations and logistics.⁸
8. The KL Group’s trading name, business name and brand name for the provision of products and services in Singapore is “K” Line.⁹ KL has the following subsidiaries and affiliates registered in Singapore:-
- a. “K” Line Pte. Ltd.;
 - b. “K” Line (Singapore) Pte. Ltd.;
 - c. “K” Line Ship Management (Singapore) Pte. Ltd.;
 - d. “K” Line Logistics (Singapore) Pte. Ltd.
 - e. “K” Line Ship Management (Chemical) Pte. Ltd.;
 - f. BLUE MARINE MANAGEMENT (PTE.) LTD.;
 - g. Monson Agencies Pte. Ltd.; and
 - h. KSP INFOSYSTEMS PTE. LTD.¹⁰
9. The business activities of the KL Group in Singapore include containership services, dry bulk carriers, car carriers, LNG carriers, tankers, energy development services, heavy lifters, logistics, marine transportation, shipping agent and ship management.¹¹
10. The total worldwide revenue for the KL Group in the financial year ended 31 March 2016 was approximately JPY 1,243 billion (S\$15.71 billion).¹² The total revenue

⁷ Paragraph 7.1 of Form M1.

⁸ Paragraph 10.7 of Form M1.

⁹ Paragraph 10.4 of Form M1

¹⁰ Paragraph 10.1 of Form M1

¹¹ Paragraph 10.10 of Form M1.

¹² Paragraph 13.1 of Form M1. Exchange Rate used in Form M1 JPY 1 = S\$0.0126 (OCBC indicative exchange rates as of 25 January 2017).

for the KL Group in Singapore in the financial year ended 31 March 2016 was approximately [¥].¹³

MOL

11. MOL is a publicly-listed entity incorporated in Japan and listed on the Tokyo Stock Exchange. MOL is the ultimate parent company of 438 subsidiaries (the “**MOL Group**”).¹⁴
12. The MOL Group is involved in the following categories of business activities worldwide: dry bulk transport, tanker transport, LNG carriers, crude oil and LNG offshore production, car carriers, containerships, terminal and logistics operations, cruise ship, and ferries and coastal liners.¹⁵
13. The MOL Group’s trading name, business name and brand name for the provision of products and services in Singapore is “MOL”.¹⁶ The MOL Group has the following subsidiaries and affiliates registered in Singapore:
 - a. MOL (Asia Oceania) Pte. Ltd.;
 - b. MOL Bulk Carriers Pte. Ltd. (pending voluntary liquidation);
 - c. MOL (Cape) Singapore Pte. Ltd.;
 - d. Phoenix Tankers Pte. Ltd.;
 - e. Tokio Marine Asia Pte. Ltd.;
 - f. Unix Line Pte. Ltd.;
 - g. [¥];
 - h. [¥];
 - i. Mitsui O.S.K. Lines (SEA) Pte. Ltd.;
 - j. MOL (Singapore) Pte. Ltd.;
 - k. MOL Logistics (Singapore) Pte. Ltd.;
 - l. [¥]; and
 - m. MOL Treasury Management Pte. Ltd.¹⁷
14. The business activities of the MOL Group in Singapore include dry bulker transport, tanker transport, LNG carriers, crude oil and LNG offshore production, car carriers, containerships, logistics, cruise, ferries and coastal liners, and software and technology services.¹⁸

¹³ Paragraph 13.4 of Form M1. Exchange Rate used in Form M1 JPY 1 = S\$0.0126 (OCBC indicative exchange rates as of 25 January 2017).

¹⁴ Paragraph 7.3 of Form M1.

¹⁵ Paragraph 10.8 of Form M1.

¹⁶ Paragraph 10.5 of Form M1.

¹⁷ Paragraph 10.2 of Form M1.

¹⁸ Paragraph 10.12 of Form M1.

15. The total worldwide revenue in the financial year ended 31 March 2016 for the MOL Group was approximately JPY 1,712 billion (S\$21.63 billion).¹⁹ The total revenue for the MOL Group in Singapore in the financial year ended 31 March 2016 was approximately [S\$].²⁰

NYK

16. NYK is a publicly-listed entity incorporated in Japan and listed on the Tokyo Stock Exchange. NYK is the ultimate parent company of 34 subsidiaries (the “**NYK Group**”).²¹
17. The NYK Group is involved in the following categories of business activities worldwide: global logistics, bulk shipping, car carriers, cruise, liquid transport, LNG carriers, real estate business, and research and development business related to shipping and logistics.²²
18. The NYK Group’s trading name, business name and brand name for the provision of products and services in Singapore is “NYK Line”.²³ The NYK Group has the following subsidiaries and affiliates registered in Singapore:
- a. NYK Group South Asia Pte. Ltd.;
 - b. NYK Shipmanagement Pte. Ltd.;
 - c. Yusen Logistics Singapore Pte. Ltd.;
 - d. NYK Bulkship (Asia) Pte. Ltd.;
 - e. NYK Business Systems South Asia Pte. Ltd.;
 - f. NYK FTC (Singapore) Pte. Ltd.;
 - g. Pacific Rim Container Depot (S) Pte. Ltd.;
 - h. NYK RORO (Asia) Pte. Ltd.; and
 - i. NYK Trading (Singapore) Pte. Ltd.²⁴
19. The business activities of NYK in Singapore include liner trade, car transport, dry bulk transport and liquid transport (crude oil, clean petroleum product, chemicals, Liquefied Petroleum Gas and LNG), air freight transport, freight forwarding service, ship management service, trading for shipping/warehousing industry and container depot service.²⁵

¹⁹ Paragraph 13.2 of Form M1. Exchange Rate used in Form M1 JPY 1 = S\$0.0126 (OCBC indicative exchange rates as of 25 January 2017).

²⁰ Paragraph 13.5 of Form M1. Exchange Rate used in Form M1 JPY 1 = S\$0.0126 (OCBC indicative exchange rates as of 25 January 2017).

²¹ Paragraph 7.5 of Form M1.

²² Paragraph 10.9 of Form M1.

²³ Paragraph 10.6 of Form M1.

²⁴ Paragraph 10.3 of Form M1.

²⁵ Paragraph 10.14 of Form M1.

20. The total worldwide revenue for the NYK Group in the financial year ended 31 March 2016 was approximately JPY 2,272 billion (S\$28.71 billion).²⁶ The total (group) revenue for NYK in Singapore in the financial year ended 31 March 2016 was approximately [§<].²⁷

Formal and Informal Links between the Parties

21. The Parties are part of “The Alliance” consortium, along with Hapag-Lloyd and Yang Ming, which is a part of a vessel sharing agreement. Hanjin was a signatory to the consortium prior to its filing for bankruptcy protection in August 2016, and has since exited. “The Alliance” consortium will be launched in April 2017, and will service the Asia – North America, Asia – Europe, Asia – Middle East and Europe – North America trade routes.²⁸ MOL and NYK, [§<].²⁹
22. “The Alliance” consortium has the aim of improving frequency of service, port coverage, capacity and efficient utilisation of assets. The intended minimum duration of the consortium is five years commencing from 1 April 2017. The parties to the consortium will be required to provide container ships and capacity sufficient to satisfy the services to be provided. [§<].³⁰
23. The Parties are otherwise independent commercial entities, and there is no common shareholder between NYK, KL, and MOL, who is in a position to control each party.³¹

III. The Transaction

The Parties’ Submissions

Strategic and Economic Rationale

24. Though the Transaction, the Parties aim to extend their global reach and enhance their liner network by:
- a. creating more synergies and enhancing operational efficiency by integrating each company’s best practices;
 - b. achieving greater economies of scale by integrating the container liner shipping businesses of the Parties;

²⁶ Paragraph 13.3 of Form M1. Exchange Rate used in Form M1 JPY 1 = S\$0.0126 (OCBC indicative exchange rates as of 25 January 2017).

²⁷ Paragraph 13.6 of Form M1. Exchange Rate used in Form M1 US\$1 = S\$0.6988 (OCBC indicative exchange rates as of 25 January 2017).

²⁸ Paragraph 9.1 of Form M1 and Paragraph 4.2 of the Parties’ response dated 14 February 2017.

²⁹ Paragraph 3 of the Parties’ second response dated 20 February 2017. Paragraph 3 of Annex 3 of the Parties’ response dated 14 February 2017. [§<]

³⁰ Paragraph 4.2 of the Parties’ response dated 14 February 2017.

³¹ Paragraph 9.2 of Form M1.

- c. developing cutting-edge technology for the services provided; and
 - d. stabilising profitability of the businesses of the Parties.³²
25. The market environment in the container liner shipping industry has adversely constrained the businesses of many players in this field, including each of the Parties to the Transaction. South Korea's biggest container liner shipping company i.e., Hanjin, had sought bankruptcy protection³³ and was declared bankrupt on 17 February 2017.³⁴ Furthermore, the deep slump in global freight levels and a rapid increase in the merger activity of the Parties' competitors like Hapag-Lloyd's proposed takeover of United Arab Shipping Company S.A.G. and CMA CGM S.A.'s takeover of Neptune Orient Lines over the last year have increased the challenges and threats to the container liner shipping businesses of NYK, MOL and KL. The move to integrate the Parties' businesses is to enable the Parties to meet these rising challenges.³⁵

Ownership Structure

26. [X] will establish [X] (i.e. "**HoldCo**"). [X] the HoldCo will in turn establish [X] ("**OpCo**").³⁶
27. [X], after obtaining antitrust clearances from the relevant competition authorities, each of the Parties will invest a certain amount of funds into HoldCo, and will become a shareholder of HoldCo, in the shareholding ratio of 38 per cent. to be held by NYK, and 31 per cent. to be held each by MOL and KL respectively. [X]. HoldCo and OpCo are collectively referred to as the joint venture company ("**JV Co**").³⁷ Figure 1 below illustrates the shareholding ratio of the Parties in the JV Co.

³² Paragraph 12.1 of Form M1.

³³ Paragraph 12.2 of Form M1.

³⁴ South Korean court declares Hanjin Shipping bankrupt, Channel NewsAsia, 17 February 2017

³⁵ Paragraph 12.2 of Form M1.

³⁶ Paragraph 8.2 of Form M1.

³⁷ Paragraph 8.3 of Form M1.

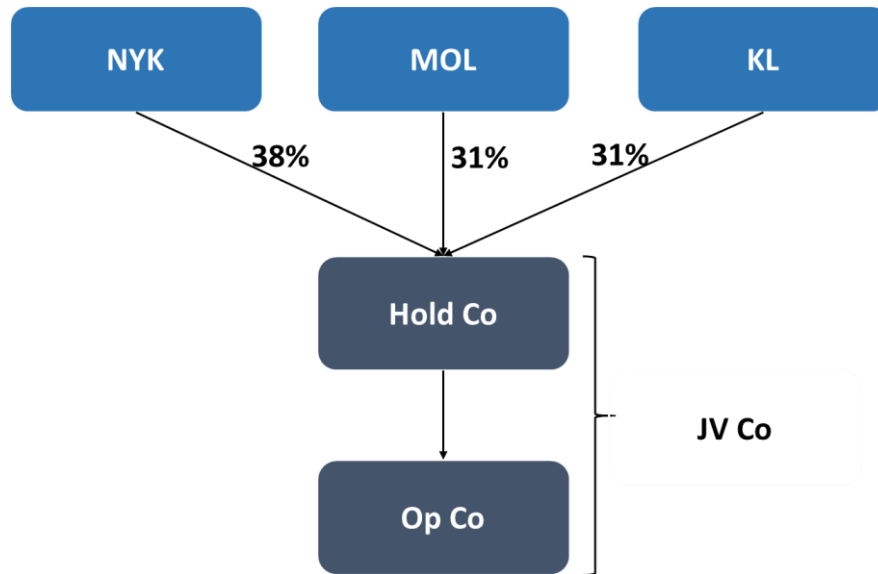


Figure 1: Parties' Shareholding Ratio in the JV Co

28. [X], each of the Parties will also invest a certain amount of funds into OpCo [X] in the same shareholding ratio of 38 per cent. to be held by NYK, and 31 per cent. to be held by MOL and KL respectively. [X].³⁸
29. [X], the JV Co will start its operation (such as procurement of its IT system and sales and marketing activities for shipment contracts with customers effective as from 1 April 2018) so that it will be in a position to start providing liner shipping services to customers after 31 March 2018 [X].³⁹
30. [X].⁴⁰
31. [X], the Parties will contribute a mix of additional funds and certain important assets (such as container ships and shares in companies which operate container terminals) that comprise the Business of each Party to OpCo, [X].⁴¹
32. [X], the JV Co will start to (and the Parties will cease to) engage in the worldwide container shipping business, and worldwide container terminal services business (excluding Japan).⁴² [X].⁴³

³⁸ Paragraph 8.4 of Form M1.

³⁹ Paragraph 8.5 of Form M1.

⁴⁰ Paragraph 8.6 of Form M1.

⁴¹ Paragraphs 8.7 and 8.8 of Form M1.

⁴² Paragraph 8.9 of Form M1.

⁴³ Paragraph 8.10 of Form M1.

Nature of the Transaction

33. The Parties submitted the Transaction falls under section 54(5) of the Act, i.e. it is a joint venture which will perform, on a lasting basis, all the functions of an autonomous economic entity.⁴⁴
34. **Joint Control.** [X]the equality in voting rights or appointment to decision-making bodies, veto rights and joint exercise of voting rights are factors which support the existence of joint control, as elaborated upon below.⁴⁵
35. [X].⁴⁶
36. With regard to veto rights, the Parties submitted that:-
- a. [X];⁴⁷ and
 - b. [X].⁴⁸
37. With regard to joint exercise of voting rights, the Parties submitted that strong common interests exist with regard to the establishment of the JV Co, as each Party will be providing contributions to the JV Co which is vital for its operation:-
- a. [X];⁴⁹
 - b. [X];⁵⁰
 - c. [X];⁵¹
 - d. [X]⁵²; and
 - e. [X].⁵³ [X].⁵⁴
38. [X].⁵⁵
39. **Performing the Functions of an Autonomous Economic Entity.** The Parties submitted that the JV Co is an autonomous economic entity based on the following:
- a. [X]; and
 - b. [X].⁵⁶

⁴⁴ Paragraph 11.2 of Form M1.

⁴⁵ Paragraph 11.2.1 of Form M1.

⁴⁶ As set out in paragraph 11.2.2 of Form M1, [X].

⁴⁷ Paragraph 11.2.3 of Form M1.

⁴⁸ Paragraph 11.2.5 of Form M1. [X]

⁴⁹ Paragraph 11.2.10 of Form M1 and Paragraph 2.2.1 of the Parties' response dated 14 February 2017. [X].

⁵⁰ Paragraph 11.2.10 of Form M1.

⁵¹ Paragraphs 3.1 to 3.5 of the Parties' response dated 14 February 2017. [X].

⁵² Paragraph 2.2.3 of the Parties' responses dated 14 February 2017.

⁵³ Paragraph 2.2.1 of the Parties' response dated 14 February 2017. [X].

⁵⁴ Paragraph 11.2.10 of Form M1.

⁵⁵ Paragraph 11.2.11 of Form M1.

⁵⁶ Paragraph 11.2.14 of Form M1.

40. **Lasting Basis.** The Parties submitted that the JV Co is intended to operate on a lasting basis. This is on the basis of the following:

- a. [REDACTED];
- b. [REDACTED]; and
- c. [REDACTED].⁵⁷

CCS's Conclusion on whether the Transaction constitutes a Merger under the Act

41. Based on the Parties' submission that the Transaction consists of the creation, on a lasting basis, of a joint venture in respect of the Business, and performs all the functions of an autonomous economic entity, the Transaction creates a joint venture constituting a merger pursuant to section 54(5) of the Competition Act.

IV. Competition Issues

The Parties' Submissions

42. The Parties submitted that the only overlap which will be contributed to the Transaction, and which would affect Singapore, is the provision of container liner shipping services in Singapore.⁵⁸

43. More specifically, the Parties currently overlap on the following routes relevant to the region which includes Singapore, i.e. East Asia⁵⁹:-

- a. East Asia-North America;
- b. East Asia-Central and South America;
- c. East Asia-Europe (including North Africa);
- d. East Asia-Africa (excluding North Africa);
- e. East Asia-Oceania; and
- f. East Asia-Middle East and Indian Subcontinent.⁶⁰

44. The Parties submitted that the business of the JV Co also includes the provision of container liner shipping and container terminal services to customers in various countries. However, the Parties do not provide container terminal services in Singapore.⁶¹ The Parties also submitted that they overlap in providing logistics services, bulk shipping, car transport, and liquid transport, through their respective subsidiaries. However, such services are not contributed to the JV Co, and will be conducted by the Parties separately and independently from each other and the JV

⁵⁷ Paragraph 11.2.15 of Form M1.

⁵⁸ Paragraph 15.1 of Form M1.

⁵⁹ Paragraph 2 of the Parties' first response dated 20 February 2017. The Parties submitted that the following countries constitute East Asia: Brunei, Cambodia, China, East Timor, Hong Kong, Indonesia, Japan, Laos, Macao, Malaysia, Myanmar, Philippines, Singapore, South Korea, Taiwan, Thailand and Vietnam.

⁶⁰ Paragraph 19.3 of Form M1.

⁶¹ Paragraph 15.1 of Form M1.

Co. The Parties hence submitted that such services are accordingly not relevant to the CCS' competitive assessment of the Transaction.⁶²

45. The Parties submitted that there are no vertical relationships between the Business of the Parties before, and after, the Transaction, with respect to Singapore. Although the Parties have subsidiaries that are involved in the forwarding business, such businesses are not the subject of the Transaction, and will be operated independently, and on an arms' length basis, from the JV Co.⁶³

CCS's Conclusion on the Competition Issues

46. CCS agrees with the Parties that the overlap which will be contributed to the Transaction, and which would affect Singapore, is the provision of container liner shipping services in Singapore. However, CCS notes that the supply of container liner shipping services by the Parties in Singapore is not limited to routes involving Singapore as port of origin or destination.⁶⁴
47. Apart from the regional trade route pairs listed by the Parties, CCS notes that the Parties also overlap on Intra-Asia trade routes.⁶⁵
48. In evaluating the potential impact of the Transaction, CCS considered whether the Transaction will give rise to any substantial lessening of competition ("SLC") concerns in the relevant markets as defined in Section VI below.

V. Counterfactual

49. As stated at paragraph 4.14 of *CCS Guidelines on the Substantive Assessment of Mergers 2016*, CCS will, in assessing mergers and applying the SLC test, evaluate the prospects for competition in the future with and without the merger. The competitive situation without the merger is referred to as the "counterfactual". The SLC test will be applied prospectively, that is, future competition will be assessed with and without the merger.
50. *CCS Guidelines on the Substantive Assessment of Mergers 2016* also states that in most cases, the best guide to the appropriate counterfactual will be prevailing conditions of competition, as this may provide a reliable indicator of future competition without the merger. However, CCS may need to take into account likely and imminent changes in the structure of competition in order to reflect as accurately as possible the nature of rivalry without the merger.⁶⁶

⁶² Paragraph 15.2 of Form M1.

⁶³ Paragraph 36.1 of Form M1.

⁶⁴ Paragraphs 1.10 to 1.15 of the Parties' response dated 23 February 2017.

⁶⁵ Annexes 4, 5 and 6 of the Parties' response dated 14 February 2017.

⁶⁶ Paragraph 4.16 of *CCS Guidelines on the Substantive Assessment of Mergers 2016*.

The Parties' Submissions

- 51. The Parties submitted that in the absence of the Transaction, the Parties would continue their business operations.
- 52. [REDACTED].⁶⁷
- 53. [REDACTED].⁶⁸
- 54. [REDACTED].⁶⁹

CCS's Conclusion on the Relevant Counterfactual

- 55. CCS accepts that the relevant counterfactual for the purposes of CCS's competition assessment is that absent the Transaction, the Parties will continue their business operations and compete in the provision of container liner shipping services in Singapore even though they may face significant competitive pressure.

VI. Relevant Markets

The Parties' Submissions

- 56. The Parties submitted that the relevant product markets for the purposes of this notification in relation to Singapore is limited to container liner shipping only, as none of the Parties operate or provide container terminal services in Singapore.⁷⁰
- 57. The Parties noted that CCS had, in its Competition (Block Exemption for Liner Shipping Agreements) Order (“**BEO**”) Explanatory Note and BEO, considered liner shipping services to mean 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.⁷¹
- 58. Further, the Parties submitted that European Commission (“**EC**”) had as a starting point, in their decisions, defined the relevant product market for container liner shipping to be the provision of regular scheduled services for the carriage of cargo by container.⁷²

⁶⁷ Paragraph 23.1 of Form M1.

⁶⁸ Paragraph 23.2 of Form M1.

⁶⁹ Paragraph 23.3 of Form M1.

⁷⁰ Paragraph 20.1 of Form M1.

⁷¹ Paragraph 20.5 of Form M1.

⁷² Paragraph 20.7 of Form M1. EC Case No. COMP/M.5450 – *Kühne Maritime/HGV/TUI/Hapag-Lloyd AG*, at [13].

Bulk versus Container

59. The Parties noted that in EC Case No. IV.M831 – *P&O Nedlloyd*, the notifying parties submitted that a large proportion of cargoes, with exceptions such as crude and mineral oils, can be transported either in bulk or in containers. A shipper will base his choice of transport on a combination of economic factors - principally freight rates, but also volume and the number of ports involved. Some goods, for example vehicles, frozen and chilled foods and forest products such as paper and board, can be carried, where volume justifies it, on bulk vessels especially designed for such cargoes.⁷³
60. The Parties explained that substitution is possible between break-bulk transport and specialised containers which have been developed to ensure the necessary ventilation and moisture control for the transport of, for example, coffee and cocoa which were traditionally transported in bulk. Substitution between bulk and container transport is particularly common for low-value goods, for example, when a container shipping line offers low rates in order to offset the costs of re-positioning empty containers.⁷⁴
61. However, the Parties submitted that the EC found that the Court of Justice in the *Tetra Pak* judgment⁷⁵ states that the stability of demand for a certain product is the appropriate basis for defining a relevant market and that when different products are, to a marginal extent, interchangeable, this does not preclude the conclusion that these products belong to separate product markets. On this basis, while it is possible that in exceptional circumstances some substitution may occur between break-bulk and container transport, the EC's enquiries did not indicate that there is in fact any lasting substitution from container towards bulk for the vast majority of cases. This is also supported by the Parties' observation that bulk vessels can be distinguished from container liner shipping.⁷⁶

Transport of Refrigerated Goods

62. The Parties submitted that a possible further delineation of the container liner shipping market may be for the transport of refrigerated goods. In this respect the Parties noted EC Case No. COMP/M.3829 – *Maersk/PONL*, where the EC considered that from a demand side perspective, certain goods such as fruit, meat and dairy products must be shipped under refrigerated conditions. For this reason, non-reefer (non-refrigerated) containers are not a substitute for reefer (refrigerated) containers. However, as to the supply side, in principle each container ship can carry non-reefer containers as well as reefer containers. Reefer containers have their own cooling unit which depends on electric energy to be provided by the ship. Container ships therefore need reefer plugs and sufficient power generation capacity to be able to transport refrigerated goods in reefer containers. According

⁷³ Paragraph 20.2 of Form M1.

⁷⁴ Paragraph 20.3 of Form M1.

⁷⁵ Case C-333/94 P, of 14/11/1996, paragraphs 13-15.

⁷⁶ Paragraph 20.4 of Form M1.

to a third party report, much of the world's container shipping fleet is equipped with plugs for reefer containers, but they are not necessarily in use for this purpose. The report indicates that it would be relatively inexpensive to equip a vessel for reefer containers and the slot could be used for non-reefer containers as well.⁷⁷

63. CCS also notes that in *CSAV/HGV/Kühne/Hapag-Lloyd*, the parties had submitted that the relevant product market for container liner shipping comprised of refrigerated (reefer) and non-refrigerated (warm) containers. The market investigation yielded mixed results concerning the definition of a narrower market for the transport of refrigerated and non-refrigerated goods, and the EC took the view that it was “*not necessary to come to a firm conclusion on whether there is indeed a separate market for the transportation of refrigerated goods because the assessment of the Transaction would not change materially under any plausible market definition.*”⁷⁸
64. In EC Case M.7908 - *CMA CGM / NOL*, the EC reaffirmed its position to look separately at reefer and non-refrigerated (warm) containers only in the case of trades with a share of reefer containers in relation to all containerised cargo of 10 per cent. or more in both directions.⁷⁹
65. The Parties are therefore of the view that the relevant product market for the purposes of assessing the competitive impact of the Transaction is container liner shipping.

Geographic Market

66. The Parties submitted that the relevant geographic market for CCS's assessment of this Transaction comprises the overlapping liner shipping trade routes of NYK, MOL and KL between broadly defined geographic regions involving East Asia (noted in paragraph 43 above), the region relevant to Singapore, which will be served by the JV Co after the Transaction, distinguished by the direction of trade flows.⁸⁰
67. The Parties submitted that in relation to the definition of the relevant geographic market for liner shipping services, CCS had, in its BEO Explanatory Note, stated that:
- “30... 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.*

⁷⁷ Paragraphs 20.10 and 20.11 of Form M1.

⁷⁸ Paragraph 20.12 of Form M1.

⁷⁹ Paragraph 20.13 of Form M1.

⁸⁰ Paragraph 20.18 of Form M1.

(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'.”⁸¹

68. The Parties noted that CCS has stated in its BEO Explanatory Note that it considers the market for regional and feeder trades to be defined as the provision of country to country services. In EC Case No. COMP/M.7523 – *CMA CGM/ OPDR*, the EC had stated that it has in the past defined a separate market for short-sea container shipping, as short-sea container shipping can potentially be distinguished from deep sea container shipping.⁸²
69. However, CCS had also stated in its BEO Explanatory Note that if carriers can readily switch capacity from other regions without significant investment, the relevant market could be much wider than just the current trade. It is accordingly plausible, and the Parties submitted this to be the case in reality, that short-sea container shipping would fall within the broader market definition for deep sea container shipping from the perspective that capacity could be diverted from trades between the same broadly defined geographic regions to serve specific country to country routes. This is akin to the EC’s findings in EC Case No. COMP/M.7523 – *CMA CGM/ OPDR*, where respondents to the EC’s market investigation confirmed that deep-sea vessels calling at European ports would constitute an alternative for customers of short-sea carriers on some trades.⁸³
70. In this regard, the Parties further submitted that suppliers are generally willing to accept cargo, via a feeder service, from the port which customers demand, or make schedule changes to call at an additional port if the volume shipped is economically justifiable. The Parties are therefore of the view that the relevant geographic market for the purposes of assessing the competitive impact of the Transaction is regional.⁸⁴

⁸¹ Paragraph 20.17 of Form M1.

⁸² Paragraph 20.19 of Form M1.

⁸³ Paragraph 20.20 of Form M1.

⁸⁴ Paragraph 20.21 of Form M1.

(a) Product Markets

Container Liner Shipping Services versus Other Modes of Transportation

71. Third-Parties' feedback suggest that container liner shipping services are distinct from other modes of transportation.
72. Customers noted that they will look for alternative container liner shipping service providers to check the "market price", when their providers increase prices.⁸⁵ No VOCCs observed that their customers switched to alternative forms of transport when prices for container liner shipping services are increased unless in times of urgency.⁸⁶
73. An NVOCC noted that there are *"no true substitutes other than rail/or air which both come with significant limitations and different trade-offs in terms of capacity, reliability, service coverage and costs. Substitutes, if any, would be in searching for alternative service providers rather than alternative products."*⁸⁷
74. Another NVOCC noted that *"where transit time is of concern, air freight or road freight could also be a substitute. Cost of air freight/road freight would be higher than ocean but is utilized in times of urgency."*⁸⁸
75. Given the above, CCS is of the view that container liner shipping services constitutes a separate market from other modes of transportation.

Container Liner Shipping Services versus Other forms of Shipping Services

76. The definition of liner shipping services in CCS's BEO Explanatory Note is:-

*"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."*⁸⁹

77. CCS notes that container liner shipping services can be distinguished from other forms of shipping services such as bulk shipping.

⁸⁵ Paragraph 8 of [X] response dated 16 February 2017. Paragraph 8 of [X] response dated 16 February 2017. Paragraph 8 of [X] response dated 28 February 2017.

⁸⁶ Paragraph 9 of [X] response dated 20 February 2017. Paragraph 9 of [X] response dated 20 February 2017. Paragraph 8 of [X] response dated 28 February 2017.

⁸⁷ Paragraph 13 of [X] response dated 20 February 2017.

⁸⁸ Paragraph 7 of [X] response dated 28 February 2017.

⁸⁹ Paragraph 13 of the Explanatory Note on the Block Exemption Order.

78. A VOCC noted that different logistics, such as type of vessel, terminal, cargo handling, liner service, and documentation are required for bulk shipping and container liner shipping, hence it is difficult for a bulk shipping provider to switch to containerised operations.⁹⁰ Another VOCC noted that tramp shipping generally relates to the transport of a single commodity which fills a ship.⁹¹ Third-Parties also noted that bulk shipping is typically more “tramp” shipping, which are unscheduled, in the sense that vessels do not sail on advertised, pre-determined routes on particular days.⁹²
79. Given the above, CCS is of the view that bulk shipping services are not substitutes for container liner shipping services.

Dry Containers versus Refrigerated Containers

80. CCS considered that a possible delineation within the container liner shipping services market may be for the transportation of refrigerated goods. Container liner shipping service providers reflected that container shipping fleet in general are equipped with plugs for reefer containers. Any container liner ship with reefer plugs can easily be used for reefer transport without significant added cost or logistical difficulties. Further, these providers noted that container liner ships with reefer units can also be used to transport non-refrigerated goods by simply using dry containers.⁹³ An NVOCC also observed that a vast majority of vessels are geared to accommodate both “reefers containers” as well as “dry” containers and reefer equipment can be purchased on the open market.⁹⁴
81. Given the above, CCS is of the view that it is appropriate not to consider the provision of refrigerated and non-refrigerated liner shipping services separately.

Trade Routes

82. **Long-Distance Oceanic Trades.** CCS’s BEO Explanatory Note states that,

“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.”⁹⁵

⁹⁰ Paragraph 7 of [X] response dated 20 February 2017.

⁹¹ Paragraph 7 of [X] response dated 20 February 2017.

⁹² Paragraph 7 of [X] response dated 20 February 2017. Paragraph 7 of [X] response dated 20 February 2017.

⁹³ Paragraph 8 of [X] response dated 20 February 2017. Paragraph 8 of [X] response dated 20 February 2017.

⁹⁴ Paragraph 8 of [X] response dated 20 February 2017.

⁹⁵ Paragraph 30(i) of the Explanatory Note on the Block Exemption Order.

83. The Parties submitted that the following countries constitute East Asia: Brunei, Cambodia, China, East Timor, Hong Kong, Indonesia, Japan, Laos, Macao, Malaysia, Myanmar, Philippines, Singapore, South Korea, Taiwan, Thailand and Vietnam.⁹⁶
84. CCS notes that from the demand-side, shippers may not have the flexibility to switch between different originating or destination ports within the same region. With respect to routes that involve Singapore as the port of origin or destination, while some Third-Parties opined that certain ports in Malaysia, such as Port of Tanjung Pelepas, Port Klang and/or Pasir Gudang may be alternatives,⁹⁷ other Third-Parties indicated that there may not be alternatives to Singapore as a port of origin or destination.⁹⁸ One customer noted that although there several alternative ports in the region, by virtue of its large manufacturing facilities in Singapore, Singapore remains the most ideal port for exporting its products.⁹⁹
85. Feedback received from Third-Parties confirms that trading conditions on the different directions of a route pair (e.g. East Asia to Europe) may be different. A VOCC noted that exports from Asia typically form the dominant leg¹⁰⁰ of a trade route pair and define the vessel size to be deployed.¹⁰¹ [X] similarly observed that the West bound leg (e.g. East Asia to Europe) would form the dominant leg on the East-West trade route, and likewise, the North bound leg (e.g. Oceania-East Asia) in a North-South trade route tend to be more dominant because of the exports from the Southern countries. [X] noted that North-South legs are generally more balanced than East-West legs.¹⁰²
86. However, from the supply-side, the Parties' capacity is generally allocated on a regional basis, and their vessels may call at multiple ports within the region at any period of time. Capacities of vessels allocated to a region do not change regardless of how many ports the vessels call at. Within a region, the capacities directed to each port are frequently changed (often on a weekly basis) in response to demand for the port or country.¹⁰³
87. VOCCs similarly noted that they are able to switch cargo capacity from other ports in the East Asia region to Singapore or deploy/re-deploy capacity in the East Asia

⁹⁶ Paragraph 2 of the Parties' first response dated 20 February 2017.

⁹⁷ Paragraph 13 of [X] response dated 28 February 2017. Paragraph 14 of [X] response dated 20 February 2017. Paragraphs 12 and 13 of [X] response dated 16 February 2017

⁹⁸ Paragraph 14 of [X] response dated 20 February 2017. Paragraph 10 of [X] response dated 22 February 2017.

⁹⁹ Paragraph 13 of [X] response dated 1 March 2017.

¹⁰⁰ A "leg of trade" is defined as one of the two directions of a trade (e.g. on the trade connecting Northern Europe to North America and back, Northern Europe – North America is the first leg and North America – Northern Europe is the second leg

¹⁰¹ Paragraph 21 of [X] response dated 20 February 2017.

¹⁰² Paragraph 6 of [X] response dated 21 February 2017.

¹⁰³ Paragraph 8.1 of the Parties' response dated 14 February 2017.

- region readily.¹⁰⁴ An NVOCC noted that as almost all VOCCs are part of consortiums, they are generally able to readily switch cargo capacity from other ports in the East Asia region to Singapore.¹⁰⁵ A VOCC also noted that *“a high general demand in certain areas can provide sufficient volume for all carriers to call even at different, close-by ports... the ideal geographic location of Singapore makes it easy to include Singapore in any service that is already passing from east to west or west to east through Asia.”*¹⁰⁶ The same VOCC noted that container liner shipping providers do not switch cargo capacity from ports outside of East Asia to Singapore as it is *“mostly a matter of geographic proximity and connectivity”*.¹⁰⁷
88. Third-Parties similarly noted that the following ranges of ports constituted a single end of trade:- North America, Central and South America; Europe (including North Africa); Africa (excluding North Africa); East Asia; Oceania; and Middle East and Indian Subcontinent.¹⁰⁸
89. VOCCs noted that the ranges of ports and market share figures derived on this basis adequately capture the state of competition amongst competing carriers.¹⁰⁹ A VOCC explained that all ports in Europe and Northern Africa should be regarded as a single end of a trade. It is relatively easy to switch port rotation (supply side substitutability) without incurring significant costs, and the distances between ports in Northern Europe (including Russian ports) and the Mediterranean (including ports in Northern Africa) are relatively short.¹¹⁰
90. In this regard, the EC noted in Case No. M.7908 *CMA CGM//NOL* similar broad geographic regions as constituting a single end of trade:-
- “(12) In the Commission's market investigation, majorities of competitors and customers alike considered that, consistent with precedents, the following ranges of ports constituted a single end of trade:- Northern Europe, Mediterranean, North America, South America East Coast, South America West Coast, Central America and Caribbean, Middle East, Indian Subcontinent, Far East, Australia and New Zealand, North Africa, West Africa and East Africa.”*¹¹¹

¹⁰⁴ Paragraph 11 of [X] response dated 20 February 2017. Paragraph 12 of [X] response dated 20 February 2017.

¹⁰⁵ Paragraph 18 of [X] response dated 20 February 2017.

¹⁰⁶ Paragraphs 10 and 23 of [X] response dated 20 February 2017.

¹⁰⁷ Paragraph 13 of [X] response dated 20 February 2017.

¹⁰⁸ Paragraph 3 of [X] response dated 22 February 2017. Parts 2(a) and (b) of [X] response dated 24 February 2017. Part 2 of [X] response to CCS's further request for information dated 27 February 2017.

¹⁰⁹ Parts 2(a) and (b) of [X] response dated 24 February 2017. Parts 2(a) and (b) of [X] response dated 27 February 2017.

¹¹⁰ Parts 2(a) and (b) of [X] response dated 24 February 2017.

¹¹¹ EC Case No. COMP/ M.7908 *CMA CGM//NOL*, at 12.

91. Given the supply-side substitution considerations above, CCS is of the view that each of the long-distance oceanic trades between broadly defined geographical regions (e.g. East Asia-Europe, East Asia-North America) may be considered a single product market.
92. **Intra-Asia Trade.** CCS's BEO Explanatory Note states that,
- "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)." ¹¹²*
93. CCS notes that the Parties provide intra-Asia container liner shipping services, of which some do not involve Singapore as an origin or destination. For example, KL operates the JABCO-1 service which covers Japan, Thailand and Vietnam, ¹¹³ NYK's SEA Paradise service covers countries in Asia such as Singapore, Myanmar, Vietnam, Thailand, Malaysia, Indonesia ¹¹⁴, and MOL's AJ2 service covers Singapore and Indonesia, while its BHF service is focused only on China and South Korea. ¹¹⁵
94. Based on feedback from some of the major customers of the Parties, liner shipping services for intra-Asia routes constitute a large proportion of their orders. A customer noted that up to 95% of the liner shipping services that it procures from the Parties are intra-Asia routes as it uses Singapore as a distribution hub for the region. ¹¹⁶ Another major customer indicated that, from one of the Parties, it only procures the Party's intra-Asia liner shipping services. ¹¹⁷
95. As noted in the discussion of long distance oceanic trades, liners are able to switch cargo capacity between ports within the same region. Hence, CCS is of the view that intra-Asia trade routes may be considered a single product market.

(b) Geographic Market

96. The geographic market refers to the area over which substitution takes place. If buyers will travel further afield to buy products when their local prices are increased, then the geographical spread of the market is wide and vice versa. If sellers from afar will now supply to local markets because the local price has risen, then the geographic market is also wider than the situation where only local sellers are willing to supply. ¹¹⁸

¹¹² Paragraph 30(ii) of the Explanatory Note on the Block Exemption Order.

¹¹³ <http://www.kline.co.jp/en/service/container/route/>.

¹¹⁴ <http://www.nykroro.com/documents/SeaParadise/SeaParadisewk08.pdf>.

¹¹⁵ <http://cms.molpower.com/Service/Network/TradeLaneService/trdIUId/700000000321>.

¹¹⁶ Paragraph 10 of [3<] response dated 22 February 2017.

¹¹⁷ Paragraph 10 of [3<] response dated 1 March 2017.

¹¹⁸ Paragraph 4.1 of CCS's *Guidelines on Market Definition*.

Buyers

97. Singapore is a major transshipment hub that is served by a large number of liner shipping service providers.¹¹⁹ CCS notes from Third-Parties that the purchase and sale of container liner shipping services is done on a worldwide basis regardless of the region pair and direction of the routes.
98. A customer of the Parties explained that its regional offices in the United States, Europe and East Asia will coordinate and request tenders for the trade routes that it requires worldwide. The routes procured and the rates agreed upon under the global tender will be valid for all of its subsidiaries.¹²⁰ This customer has one year contracts with liner shipper service providers and will not accede to rate increases unless the liner shipping service provider has raised the possibility of rate increases in its tender submission.¹²¹
99. Another customer of the Parties similarly procures services from VOCCs on a global basis. Its procurement department consolidates shipping requirements from business units before calling for tenders on a consolidated global basis. Depending on the scope of the tender, most of the non-Singapore routes are negotiated in Singapore with VOCCs.¹²²
100. A third customer of the Parties runs annual tenders for each route and prices for all routes are fixed for the one-year term of the contracts. This customer has three to four backup providers for each contracted route.¹²³
101. An NVOCC noted that it procures from VOCCs on a global scale, and negotiates for prices and terms based on a global package.¹²⁴ Third-Parties also noted that there are trading companies based in Singapore that can purchase container liner shipping services that do not involve Singapore as a port of call.¹²⁵

Sellers

102. NYK opined that [REDACTED].¹²⁶ KL submitted that [REDACTED].¹²⁷ [REDACTED].¹²⁸ NYK explained that [REDACTED].¹²⁹ MOL [REDACTED].¹³⁰

¹¹⁹ Paragraph 5 of [REDACTED] response dated 27 February 2017. Paragraph 1 of [REDACTED] response dated 21 February 2017.

¹²⁰ Paragraph 23 of [REDACTED] response dated 22 February 2017.

¹²¹ Paragraph 8 of [REDACTED] response dated 22 February 2017.

¹²² Paragraph 26 of [REDACTED] response dated 1 March 2017.

¹²³ Paragraph 26 of [REDACTED] response dated 16 February 2017.

¹²⁴ Paragraph 23 of [REDACTED] response dated 28 February 2017.

¹²⁵ Paragraph 7 of [REDACTED] response dated 23 February 2017. Parts 1(a) and (b) of [REDACTED] response dated 24 February 2017. Parts 1(a) and (b) of [REDACTED] response dated 28 February 2017.

¹²⁶ Paragraph 2.2 of the Parties' response dated 23 February 2017.

¹²⁷ Paragraph 1.4 of the Parties' response dated 23 February 2017.

¹²⁸ Paragraph 1.10 of the Parties' response dated 23 February 2017.

¹²⁹ Paragraph 1.11 of the Parties' response dated 23 February 2017.

¹³⁰ Paragraph 1.12 of the Parties' response dated 23 February 2017.

103. A VOCC noted that because of its global trading network of vessels, it is able to cater to customers' requirements, regardless of the customers' locations. The VOCC indicated that it has customers that purchase liner shipping services from its Singapore sales office for a wide range of routes that do not involve Singapore as origin or destination. It explained that this was mainly due to the fact that there is a significant group of commodity traders based in Singapore who can decide to ship their cargoes on routes where Singapore is neither the origin nor the destination. Although the VOCC has customers based outside of Singapore purchasing liner shipping services from its sales office, these represent a very low percentage of its customer base.¹³¹
104. Another VOCC noted that customers can generally buy all possible routes on its network and large global customers based in Singapore usually procure rates on routes of all main trades here. It also operates a [REDACTED] to service its customers with a satellite office in Singapore. However, the VOCC's customers that are located outside Singapore usually procure container liner services through the VOCC's local sales office where the customer is located and not through the VOCC's local Singapore sales office.¹³²
105. CCS also notes from Third-Parties' feedback that most of the VOCCs are present in Singapore¹³³, and are selling container liner shipping services on their own vessels and/or through alliances with other liners.
106. Given the above, CCS is of the view that the geographic scope of the product markets is global.

Conclusion on Relevant Markets

107. Given the above, the global supply of container liner shipping services for Intra-Asia trade routes and for each of the following container liner shipping service trades involving East Asia (which includes Singapore) as both origin and destination with the regions below:-
- North America;
 - Central and South America;
 - Europe (including North Africa);
 - Africa (excluding North Africa);
 - Oceania; and
 - Middle East and Indian Subcontinent;
- are the relevant markets for the purposes of assessing the impact of the Transaction on competition (collectively, the "**Relevant Markets**").

¹³¹ [REDACTED] response dated 24 February 2017; Parts 1(a) and (b) of [REDACTED] response dated 20 February 2017.

¹³² Paragraph 1(a) and (b) of [REDACTED] response dated 28 February 2017.

¹³³ Paragraph 1 of [REDACTED] response dated 21 February 2017. Paragraph 23 of [REDACTED] response dated 22 February 2017. Parts 1(a) and (b) of [REDACTED] response dated 24 February 2017.

VII. Industry Trends Background and Market Structure

(a) Current industry trends

The Parties' Submissions

108. The Parties submitted that the market environment in the container liner shipping industry has adversely constrained the businesses of many players, including each of the Parties to the Transaction, in the following ways:-

- a. Mergers and acquisitions: There have been an unprecedented number of mergers and acquisitions in the sector, such as Hapag-Lloyd's merger with United Arab Shipping Company S. A. G. and the announcement of A.P. Moller-Maersk S.A.'s agreement to buy Hamburg Süd. It was submitted that such mergers are set to continue, with smaller players likely to be takeover targets;
- b. Disruption to global trade: The market suffered a disruption in global trade due to the bankruptcy of South Korea's biggest shipping line (once the world's largest shipping firm), Hanjin; and
- c. Overcapacity: Low demand growth is expected to exacerbate overcapacity and put pressure on freight rates, which in turn, is expected to drive further merger and acquisitions.¹³⁴

109. More recently, in 2016, the Group CEO of PSA described 2016 as "*another difficult year for the port and shipping industry*" and added that the tough business environment was likely to continue into 2017. He cited that the industry was likely to face system-wide changes due to the convergence of slow market growth, emerging technologies and new business needs. New shipping service deployments and products are expected, which will demand adjustments and adaptations by terminal operators as well as players in the global supply chain.¹³⁵

Feedback from Third-Parties

110. Third-Parties generally observed similar trends as submitted by the Parties. Firstly, there is overcapacity in the container liner shipping industry.¹³⁶ A VOCC noted that it is not facing capacity constraints and has not been operating at full capacity for consecutive months. Even in cases of shortages of space, this VOCC is able to deploy "extra loader" vessels for a half or round trip, or obtain space from partners

¹³⁴ Paragraph 18.17 of Form M1.

¹³⁵ Paragraph 18.18 of Form M1. Source: <https://www.singaporepsa.com/images/2017/nr170112.pdf>.

¹³⁶ Paragraph 2 of [§<] response dated 16 February 2017. Paragraph 2 of [§<] response dated 20 February 2017. Paragraph 2 of [§<] response dated 20 February 2017. Paragraph 2 of [§<] response dated 16 February 2017. Paragraph 2 of [§<] response dated 28 February 2017. Paragraph 1 of [§<] response dated 27 February 2017.

or competitors.¹³⁷ Another VOCC similarly observed that “*the global container liner shipping industry continues to face challenges such as structural overcapacity in the market at the moment and in the foreseeable future.*”¹³⁸

111. Third-Parties also noted that there has been a trend of consolidation in the industry in the past few years.¹³⁹ In particular, a customer noted that the industry is “not stable” and opined that there could be further changes to the industry in 2017.¹⁴⁰ An NVOCC also noted the current trend of consolidation is happening on a worldwide basis, and it is likely that this trend would continue. It further noted that besides consolidation of container liner shipping companies, the number of alliances has also decreased.¹⁴¹
112. Third-Parties noted that freight rates have been depressed. [X] noted that VOCCs are experiencing declining revenue per container over the years. For example, in 2016, the freight rate for a container from China to Europe was less than half of that in 2010. Since 2011, the sector has suffered at least 15 loss-making quarters, in some cases resulting in either mergers (for example Hamburg Sud) or bankruptcies (an example being Hanjin Shipping) in 2016.¹⁴²
113. A customer noted that there has been service disruptions in the container liner shipping industry in recent years and cited the example of the bankruptcy of Hanjin.¹⁴³ One customer noted that vessel capacity is seasonal in nature and tends to fluctuate. It went on to note that since Hanjin’s bankruptcy, it has been facing some space constraints on West bound routes going to India.¹⁴⁴

(b) Market shares and market concentration

The Parties’ Submissions

Global Market Shares

114. Based on the estimated market shares in the Alphaliner November 2016 Monthly Monitor report, the JV Co will have a combined global market share of [0-10]% based on twenty foot equivalent units (“TEU”) capacity, placing it as the [X] largest amongst competing VOCCs.¹⁴⁵ Table 1 sets out the top 10 largest VOCCs together with the Parties’ global market share estimates based on capacity.

¹³⁷ Paragraph 21 of [X] response dated 20 February 2017.

¹³⁸ Paragraph 21 of [X] response dated 20 February 2017.

¹³⁹ Paragraph 3 of [X] response dated 16 February 2017. Paragraph 2 of [X] response dated 20 February 2017. Paragraph 9 of [X] response dated 16 February 2017. Paragraph 1 of [X] response dated 27 February 2017.

¹⁴⁰ Paragraph 3 of [X] response dated 16 February 2017.

¹⁴¹ Paragraph 2 of [X] response dated 20 February 2017.

¹⁴² Paragraph 1 of [X] response dated 27 February 2017.

¹⁴³ Paragraph 2 of [X] response dated 16 February 2017.

¹⁴⁴ Paragraph 2 of [X] response dated 22 February 2017.

¹⁴⁵ Slide 12 of Annex 10 of Form M1.

Rank	Name	Market Share
1	Maersk (“MSK”)	[10-20]%
2	Mediterranean Shipping Company (“MSC”)	[10-20]%
3	CMA CGM	[10-20]%
4	COSCO Shipping (“COSCO”)	[0-10]%
5	Evergreen (“EMC”)	[0-10]%
6	Hapag Lloyd	[0-10]%
7	Hamburg Süd (“HSD”)	[0-10]%
8	Orient Overseas Container Line (“OOCL”)	[0-10]%
9	Yang Ming	[0-10]%
10	United Arab Shipping Company (“UASC”)	[0-10]%
11	MOL	[0-10]%
12	NYK	[0-10]%
16	K Line	[0-10]%
(5)	JV Co	[0-10]%

*Table 1: Global Market Share Estimate Nov 2016
(Based on the Alphaliner November 2016 Monthly Monitor)*

Long-Oceanic Trade

115. The Parties submitted that routes involving Singapore are aggregated as part of the regional trade routes involving East Asia, which Singapore falls within.
116. The Parties noted that it would not be meaningful to consider shares within Singapore in view of the nature of the overlapping goods and services which involves container liner shipping between two ports.¹⁴⁶ The Parties also submitted that, [§<].¹⁴⁷
117. The Parties submitted 2014 - 2016 estimates of total market size and market shares of the Parties and competitors for the identified overlapping regional container liner shipping routes (round trip), based on capacity estimates (by TEU) from the Parties’ observations and third party industry reports.¹⁴⁸ These are documented in Tables 2a to 2f below.
118. The Parties submitted that they do not otherwise have market share and share estimates on the basis of value and volume shipped.¹⁴⁹

¹⁴⁶ Paragraph 22.2 of Form M1.

¹⁴⁷ Paragraph 3.1 of the Parties’ response dated 20 February 2017.

¹⁴⁸ The Parties’ market share data submitted to the CCS in the Parties’ second response on 20 February 2017.

¹⁴⁹ Paragraph 21.1 of Form M1.

2014			2015			2016		
Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share
MSK (1)	[<]	[0-10]%	MSK (1)	[<]	[10-20]%	CMACGM (1)	[<]	[10-20]%
EMC (2)	[<]	[0-10]%	CMACGM (2)	[<]	[0-10]%	MSK (2)	[<]	[10-20]%
COSCO (3)	[<]	[0-10]%	EMC (3)	[<]	[0-10]%	COSCO (3)	[<]	[10-20]%
.....								
MOL (8)	[<]	[0-10]%	KL (7)	[<]	[0-10]%	NYK (5)	[<]	[0-10]%
KL (11)	[<]	[0-10]%	NYK (8)	[<]	[0-10]%	MOL (6)	[<]	[0-10]%
NYK (12)	[<]	[0-10]%	MOL (10)	[<]	[0-10]%	KL (8)	[<]	[0-10]%
JV Co	[<]	[10-20]%	JV Co	[<]	[10-20]%	JV Co	[<]	[10-20]%

Table 2a: 2014-2016 Market Share Estimates for East Asia - North America (ranked by TEU)

2014			2015			2016		
Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share
MSK (1)	[<]	[20-30]%	MSK (1)	[<]	[20-30]%	MSK (1)	[<]	[10-20]%
MSC (2)	[<]	[10-20]%	HSD (2)	[<]	[10-20]%	CMACGM (2)	[<]	[10-20]%
HSD (3)	[<]	[10-20]%	HL (3)	[<]	[10-20]%	MSC (3)	[<]	[10-20]%
...								
MOL (5)	[<]	[0-10]%	MOL (7)	[<]	[0-10]%	MOL (8)	[<]	[0-10]%
NYK (9)	[<]	[0-10]%	NYK (8)	[<]	[0-10]%	NYK (9)	[<]	[0-10]%
KL (12)	[<]	[0-10]%	KL (14)	[<]	[0-10]%	KL (11)	[<]	[0-10]%
JV Co	[<]	[10-20]%	JV Co	[<]	[0-10]%	JV Co	[<]	[10-20]%

Table 2b: 2014-2016 Market Share Estimates for East Asia - Central and South America (ranked by TEU)

2014			2015			2016		
Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share
MSK (1)	[<]	[10-20]%	MSK (1)	[<]	[20-30]%	MSK (1)	[<]	[20-30]%
CMA CGM (2)	[<]	[10-20]%	OOCL (2)	[<]	[10-20]%	OOCL (2)	[<]	[10-20]%
OOCL (3)	[<]	[0-10]%	CMACGM (3)	[<]	[10-20]%	CMACGM (3)	[<]	[10-20]%
...								
MOL (6)	[<]	[0-10]%	MOL (9)	[<]	[0-10]%	MOL (7)	[<]	[0-10]%
NYK (10)	[<]	[0-10]%	NYK (14)	[<]	[0-10]%	KL (13)	[<]	[0-10]%
KL (19)	[<]	[0-10]%	KL (16)	[<]	[0-10]%	NYK (14)	[<]	[0-10]%
JV Co	[<]	[10-20]%	JV Co	[<]	[0-10]%	JV Co	[<]	[0-10]%

Table 2c: 2014-2016 Market Share Estimates for East Asia - Oceania (ranked by TEU)

2014			2015			2016		
Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share
MSK (1)	[<]	[20-30]%	MSC (1)	[<]	[10-20]%	MSC (1)	[<]	[10-20]%
MSC (2)	[<]	[10-20]%	MSK (2)	[<]	[10-20]%	MSK (2)	[<]	[10-20]%
CMACGM (3)	[<]	[10-20]%	CMACGM (3)	[<]	[10-20]%	COSCO (3)	[<]	[10-20]%
...								
NYK (9)	[<]	[0-10]%	MOL (11)	[<]	[0-10]%	NYK(11)	[<]	[0-10]%
MOL (14)	[<]	[0-10]%	NYK (13)	[<]	[0-10]%	MOL(12)	[<]	[0-10]%
KL (15)	[<]	[0-10]%	KL (14)	[<]	[0-10]%	KL(13)	[<]	[0-10]%
JV Co	[<]	[0-10]%	JV Co	[<]	[0-10]%	JV Co	[<]	[0-10]%

Table 2d: 2014-2016 Market Share Estimates for East Asia – Europe (including North Africa) (ranked by TEU)

2014			2015			2016		
Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share
MSK (1)	[X]	[40-50]%	MSK (1)	[X]	[40-50]%	MSK (1)	[X]	[30-40]%
CMACGM (2)	[X]	[10-20]%	CMACGM (2)	[X]	[10-20]%	PIL (2)	[X]	[10-20]%
PIL ¹⁵⁰ (3)	[X]	[10-20]%	PIL (3)	[X]	[10-20]%	CMACGM (3)	[X]	[10-20]%
...								
MOL(6)	[X]	[0-10]%	MOL(5)	[X]	[0-10]%	MOL (7)	[X]	[0-10]%
KL(8)	[X]	[0-10]%	KL(10)	[X]	[0-10]%	KL(10)	[X]	[0-10]%
NYK(NA)	[X]	[0-10]%	NYK(NA)	[X]	[0-10]%	NYK(NA)	[X]	[0-10]%
JV Co	[X]	[0-10]%	JV Co	[X]	[0-10]%	JV Co	[X]	[0-10]%

Table 2e: 2014-2016 Market Share Estimates for East Asia - Africa (excluding North Africa) (ranked by TEU)

2014			2015			2016		
Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share	Name (Rank)	Total TEU	Mkt. Share
APL (1)	[X]	[0-10]%	APL(1)	[X]	[0-10]%	CMACGM (1)	[X]	[10-20]%
EMC (2)	[X]	[0-10]%	HJS (2)	[X]	[0-10]%	HMM ¹⁵¹ (2)	[X]	[0-10]%
HJS ¹⁵² (3)	[X]	[0-10]%	EMC (3)	[X]	[0-10]%	COSCO (3)	[X]	[0-10]%
...								
NYK (16)	[X]	[0-10]%	NYK (16)	[X]	[0-10]%	MOL (12)	[X]	[0-10]%
MOL (17)	[X]	[0-10]%	MOL(19)	[X]	[0-10]%	NYK (13)	[X]	[0-10]%
KL (23)	[X]	[0-10]%	KL(26)	[X]	[0-10]%	KL (20)	[X]	[0-10]%
JV Co	[X]	[0-10]%	JV Co	[X]	[0-10]%	JV Co	[X]	[0-10]%

Table 2f: 2014-2016 Market Share Estimates for East Asia - Middle East and Indian Subcontinent (ranked by TEU)

¹⁵⁰ Pacific International Lines

¹⁵¹ Hyundai Merchant Marine

¹⁵² Hanjin Shipping

119. The Alphaliner November 2016 Monthly Monitor¹⁵³ report also sets out the existing TEU capacity of VOCCs and the breakdown of this capacity by wider trade routes namely, the Far East¹⁵⁴ – North America and Far East – Europe trade routes.¹⁵⁵
120. Table 3(a) sets out the top three competitors and the JV Co's post-Transaction market share for the Far East – North America trade route.

Name (Rank)	Total TEU	Market Share
MSK (1)	[8<]	[10-20]%
CMACGM (2)	[8<]	[10-20]%
COSCO (3)	[8<]	[10-20]%
...		
NYK (5)	[8<]	[0-10]%
MOL (6)	[8<]	[0-10]%
KL (8)	[8<]	[0-10]%
JV Co (1)	[8<]	[10-20]%

Table 3(a): CCS's Derivation of the Far East – North America Market Share Estimates by TEU (Based on the Alphaliner November 2016 Monthly Monitor)

121. Table 3(b) sets out the top three competitors and the JV Co's post-Transaction market share the Far East – Europe trade route.

Name (Rank)	Total TEU	Market Share
MSK (1)	[8<]	[10-20]%
CMACGM (2)	[8<]	[10-20]%
COSCO (3)	[8<]	[10-20]%
...		
NYK (11)	[8<]	[0-10]%
MOL (12)	[8<]	[0-10]%
KL (13)	[8<]	[0-10]%
JV Co (5)	[8<]	[0-10]%

Table 3(b): CCS's Derivation of the Far East – Europe Market Share Estimates by TEU (Based on the Alphaliner November 2016 Monthly Monitor)

¹⁵³ While the list of liners presented in the report may not be exhaustive, the market share of the JV Co obtained from the report represents an upper bound. Including the shares of other liners would result in a smaller market share of the JV Co. Given that no competition issues would arise based on the market shares of the JV Co obtained from the Alphaliner November 2016 Monthly Monitor, CCS is of the view that these market share figures are sufficient for our assessment.

¹⁵⁴ Per Alphaliner's [Guide about Liner Services](#), the definition of Far East constitute: South East Asia (from Burma to Hong Kong) and North East Asia (China, Korea, Japan). This corresponds to the Parties' definition of East Asia.

¹⁵⁵ Slide 12 and 22 of Annex 10 of Form M1.

Intra-Asia Trade Routes

122. The Alphaliner November 2016 Monthly Monitor report also sets out the existing TEU capacity of VOCCs and the breakdown of this capacity by Intra-Far East. Table 4 sets out the top three competitors and the JV Co's post-Transaction market share on Intra-Far East trade routes.¹⁵⁶

Name (Rank)	Total TEU	Market Share
COSCO (1)	[>]	[20-30]%
MSK (2)	[>]	[10-20]%
EMC (3)	[>]	[0-10]%
...		
MOL(10)	[>]	[0-10]%
NYK(13)	[>]	[0-10]%
KL(15)	[>]	[0-10]%
JV Co (5)	[>]	[0-10]%

Table 4: CCS's Derivation of the Intra-Far East Market Share Estimates by TEU
(Based on the Alphaliner November 2016 Monthly Monitor)

CCS's Assessment

123. As set out in *CCS Guidelines on the Substantive Assessment of Mergers 2016*, CCS is generally of the view that competition concerns are unlikely to arise in a merger situation unless the merged entity will have a market share of 40% or more, or the merged entity will have a market share of between 20% to 40% and with a post-merger CR3 at 70% or more.¹⁵⁷
124. Under paragraph 4 of the BEO, market shares can be 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 TEUs.¹⁵⁸ Given that trade route products are defined based on supply-side substitution, CCS is of the view that aggregate cargo carrying capacity is appropriate for the purposes of calculating market shares. The EU has similarly used aggregate cargo carrying capacity for calculation of market shares¹⁵⁹
125. **Global.** Based on the estimated market share in the Alphaliner November 2016 Monthly Monitor report, the JV Co will have a combined global market share of [0-10] %, placing it as the [>] largest amongst competing VOCCs by TEU capacity.

¹⁵⁶ Slide 12 and 22 of Annex 10 of Form M1.

¹⁵⁷ Paragraph 5.15 of *CCS Guidelines on the Substantive Assessment of Mergers*. CR3 refers to the combined market shares of the three largest firms.

¹⁵⁸ Paragraph 27 of the Explanatory Note on the Block Exemption Order.

¹⁵⁹ See for example Case No. COMP/M.3829 *Maersk/PONL* and Case No. COMP/7908 *CMA CGM/NOL*.

126. An NVOCC similarly opined that the combined market share of the JV Co is approximately 6% globally.¹⁶⁰ Third-Parties noted that post-Transaction, the JV Co's scale of operations are smaller than their larger competitors such as Maersk, CMA CGM and MSC and that the JV Co's global market share by capacity would place it as fifth largest in the world.¹⁶¹
127. **Relevant Markets.** None of the Parties' market shares for each of the Relevant Markets crosses CCS's indicative thresholds of a merger situation that may raise competition concerns.
- a. East Asia – North America: [10-20]%¹⁶²
 - b. East Asia – Central and South America: [10-20]%
 - c. East Asia – Oceania: [0-10]%
 - d. East Asia – Europe (including North Africa): [0-10]%¹⁶³
 - e. East Asia – Africa (excluding North Africa) : [0-10]%
 - f. East Asia – Middle East and Indian Subcontinent : [0-10]%
 - g. Intra-Asia: [0-10]%¹⁶⁴

(c) **Barriers to entry and expansion**

128. In assessing barriers to entry and expansion, CCS considered whether entry by new competitors or expansion by existing competitors may be sufficient in likelihood, scope and time to deter or defeat any attempt by the merger parties or their competitors to exploit the reduction in rivalry flowing from the Transaction (whether through coordinated or non-coordinated strategies).

The Parties' Submissions

129. **Capital Expenditure.** The Parties submitted that the estimated capital expenditure required to enter the relevant market necessary to gain a five per cent. market share, both as a new entrant and as a company that has already been established, is highly dependent on the trade route.¹⁶⁵

130. [REDACTED]¹⁶⁶ [REDACTED]¹⁶⁷ [REDACTED].¹⁶⁸

¹⁶⁰ Paragraph 4 of [REDACTED] response dated 28 February 2017.

¹⁶¹ Paragraph 4 of [REDACTED] response dated 16 February 2017. Paragraph 4 of [REDACTED] response dated 21 February 2017.

¹⁶² CCS's derivation based on the Alphaliner November 2016 report, [10-20]% based on a Far East – North America trade route.

¹⁶³ CCS's derivation based on the Alphaliner November 2016 report, [0-10]% based on a Far East – Europe trade route.

¹⁶⁴ Parties' second response dated 20 February 2017.

¹⁶⁵ Paragraph 26.1 of Form M1.

¹⁶⁶ Based on data published in the January 2016 issue of Alphaliner report.

¹⁶⁷ [REDACTED].

¹⁶⁸ Paragraph 2 of Parties' Supplementary Submission to CCS dated 3 March 2017.

131. [REDACTED].¹⁶⁹
132. [REDACTED].¹⁷⁰
133. [REDACTED].¹⁷¹
134. [REDACTED].¹⁷²
135. [REDACTED].¹⁷³
136. **Barriers to Entry.** The Parties submitted that there are no prohibitive barriers to entry to Singapore as the capital expenditure required to provide container liner shipping services involving Singapore is low (as noted in the paragraphs above), and there is significant idle capacity in the container liner shipping industry overall which can be easily deployed, and for slot swapping agreements to be easily entered into to enable a competitor to expand the scope of its services, should there be demand for the services.¹⁷⁴
137. The Parties also submitted that due to the current difficult market conditions, there is not much incentive for potential new entrants looking to enter the container liner shipping industry and their prospects are low. However, once the market recovers, for example, regional container shipping lines are likely to enter the deep sea / long haul container liner shipping market, and bulk carriers are likely to enter the container liner shipping business. [REDACTED].¹⁷⁵
138. The barriers to entry in the container liner shipping market are not prohibitive when market conditions improve. Any competitor or logistics operator can easily start offering new services or expand its current services if there is sufficient demand. Regional carriers can expand their reach to neighbouring trades and bulk carriers can enter the container liner shipping business by leveraging their know-how to operate vessels internationally. There is no need for carriers to own vessels and instead they may provide services through slot chartering or consortia with other carriers and own vessels at a later stage. The EC has, in its decisional practice in EC Case No COMP/M.7523 – *CMA CGM/ OPDR*, recognised that entry or expansion in the container liner shipping business can be achieved within three to 12 months. It was also noted that customers have the ability to entice competitors to enter or expand their services on markets by adding ports of call on their rotations.¹⁷⁶

¹⁶⁹ Paragraph 3 of Parties' Supplementary Submission to CCS dated 3 March 2017.

¹⁷⁰ Paragraph 4 of Parties' Supplementary Submission to CCS dated 3 March 2017.

¹⁷¹ Paragraph 26.2.2 of Form M1.

¹⁷² Paragraph 26.4 of Form M1.

¹⁷³ Paragraph 26.3 of Form M1.

¹⁷⁴ Paragraph 28.1 of Form M1.

¹⁷⁵ Paragraph 30.1 of Form M1.

¹⁷⁶ Paragraph 30.2 of Form M1.

139. **Barriers to Expansion.** The Parties noted that Singapore has one of the most popular ports in the industry and almost all of the major container liner shipping providers already provide liner shipping services in Singapore due to its accessibility. Container liner shipping providers are also able to access Singapore easily and expand their business to Singapore by using existing service loops calling on Singapore as a way port, or through slot swaps.¹⁷⁷
140. The Parties submitted that there is significant spare capacity in the container vessel chartering market globally. As of 31 October 2016, [X] were available in the container vessel chartering market. The Parties further submitted that there are many container ships owned by various competitors which are not deployed and idle. Accordingly, competitors are able to easily expand the scope and frequency of their services, if there is demand.¹⁷⁸

Feedback from Third-Parties

141. Third-Parties submitted that apart from capital expenditure, there is little to no other substantial barriers to entry into the market for the provision of container liner shipping services involving Singapore.¹⁷⁹ It was pointed out that the number of open berth windows at the port terminal could be a potential barrier of entry.¹⁸⁰ However, this limitation does not apply to Singapore.¹⁸¹
142. The capital expenditure required for entry largely depends on the method of entry. Generally, there are three ways to enter the container liner shipping services market in Singapore: (a) chartering slots or swapping slots on existing services; (b) joining or forming an alliance or consortium; and (c) individually setting up and operating the service with own vessels.¹⁸² The least capital intensive method is to enter into slot chartering arrangements as the new entrant will just have to purchase slots on a pre-existing liner service. The most capital intensive method of entry is for the entrant to individually operate the liner shipping service, as it would require that the new entrant has the necessary number of vessels and equipment to allow it to offer a sufficient frequency on the trade route of the liner service. Typically, only shipping companies that already operate on other trades are capable of this method of entry by shifting vessels from other trades to the new liner service. Joining or forming an alliance or consortium constitutes a middle ground as it only requires

¹⁷⁷ Paragraph 24.8 of Form M1.

¹⁷⁸ Paragraph 24.9 of Form M1.

¹⁷⁹ Paragraph 22 of [X] response dated 20 February 2017. Paragraph 34 of [X] response dated 20 February 2017. Paragraph 22 of [X] response dated 20 February 2017. Paragraph 11 of [X] response dated 21 February 2017. Paragraph 22 of [X] response dated 1 March 2017.

¹⁸⁰ Paragraph 22 of [X] response dated 20 February 2017. Paragraph 11 of [X] response dated 21 February 2017.

¹⁸¹ Paragraph 11 of [X] response dated 21 February 2017.

¹⁸² Paragraph 22 of [X] response dated 20 February 2017. Paragraph 22 of [X] response dated 20 February 2017.

that the new entrant contributes a share of the number of vessels required to operate the liner service.¹⁸³

143. While Third-Parties observed that there is “over-supply” in the industry in recent years¹⁸⁴, they also noted that there are no new potential entrants into the market for the provision of container liner shipping services involving Singapore at this point in time.¹⁸⁵
144. With regard to expansion into the market for the provision of container liner shipping services by existing players, a VOCC noted that “*the ideal geographic location of Singapore make it easy to include Singapore in any service that is already passing from east to west or west to east through Asia.*” It went on to note that there are basically no barriers for existing container liner shipping service operators to call at Singapore, apart from the capital expenditure required and the availability of terminal space.¹⁸⁶ Another VOCC also noted that the costs of switching a vessel from one trade to a different one are low, and that most ports worldwide do not require special equipment employed on the vessel.¹⁸⁷ An NVOCC opined that smaller carriers are able to expand and provide new services in Intra-Asia trades.¹⁸⁸ A customer also noted that expansion into Singapore is easy as PSA has put in place very clear and structured processes to facilitate entry.¹⁸⁹ A customer opined that CMA CGM may be moving its hub of shipping operations from Port Klang to Singapore.¹⁹⁰

CCS’s Assessment

145. Given the Parties’ submission and Third-Parties’ feedback, CCS is of the view that, although entry into the Relevant Markets through the operation of a liner’s own vessels may require a large capital expenditure, there are less capital intensive methods (e.g. chartering of slots on existing vessels operated by other liners). For intra-Asia routes where large vessel capacities are not required, large capital expenditures are even less likely to be an entry barrier. Hence, entry barriers are not likely to be prohibitively high in the Relevant Markets.

¹⁸³ Paragraph 22 of [X] response dated 20 February 2017.

¹⁸⁴ Paragraph 2 of [X] response dated 16 February 2017. Paragraph 2 of [X] response dated 20 February 2017. Paragraph 2 of [X] response dated 20 February 2017. Paragraph 2 of [X] response dated 16 February 2017.

¹⁸⁵ Paragraph 22 of [X] response dated 16 February 2017. Paragraph 24 of [X] response dated 20 February 2017. Paragraph 36 of [X] response dated 20 February 2017. Paragraph 22 of [X] response dated 16 February 2017. Paragraph 22 of [X] response dated 1 March 2017. Paragraph 4 of [X] response dated 28 February 2017.

¹⁸⁶ Paragraph 23 of [X] response dated 20 February 2017.

¹⁸⁷ Paragraph 22 of [X] response dated 20 February 2017.

¹⁸⁸ Paragraph 35 of [X] response dated 20 February 2017.

¹⁸⁹ Paragraph 22 of [X] response dated 16 February 2017.

¹⁹⁰ Paragraph 23 of [X] response dated 22 February 2017.

146. CCS is of the view that the barriers to expansion into the Relevant Markets are low. Existing liner shipping service operators operating routes that pass by Singapore are able to easily include Singapore as a port of call without incurring substantial costs. The design and processes of ports to accommodate the majority of vessels also facilitate this switching of vessels from one trade to another. [S&K] is of the view that there may be physical limitations in term of berthing window in some other ports, but the Singapore port does not have this problem.¹⁹¹

(d) Countervailing Buyer Power

147. *CCS Guidelines on the Substantive Assessment of Mergers 2016* provide that the ability of a merged entity to raise prices may be constrained by the countervailing power of customers.¹⁹²

The Parties' Submissions

148. **Types of Customers.** The Parties' customers are typically large multinational corporations across various industries.¹⁹³
149. The Parties submitted that there are two categories of customers in the provision of container liner shipping services.¹⁹⁴
150. The first category of customers are beneficial cargo owners. These refer to cargo owners who have control over their cargo from origin to the end destination, and do not enlist the services of third party suppliers such as NVOCCs or freight forwarders. Examples of beneficial cargo owners include:
- a. manufacturers who export and/or import their products, raw materials, parts and components on cost-and-freight¹⁹⁵ or free-on-board¹⁹⁶ terms, and would include automotive manufacturers, chemical companies, electronics companies, etc.; and
 - b. retailers who import goods from manufacturers mainly on free-on-board terms, and would include apparel retailers, discount stores, furniture shops, home appliance retailers, supermarkets etc.¹⁹⁷

¹⁹¹ Paragraph 11 of [S&K] response dated 21 February 2017.

¹⁹² Paragraph 5.60 of *CCS Guidelines on the Substantive Assessment of Mergers 2016*.

¹⁹³ Paragraph 19.4 of Form M1.

¹⁹⁴ Paragraph 19.5 of Form M1.

¹⁹⁵ Incoterms: "Cost-and-freight" means that the seller must pay the costs and freight necessary to bring the goods to the named port of destination but the risk of loss or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered on board the vessel is transferred from the seller to the buyer when the goods pass the ship's rail in the port of shipment.

¹⁹⁶ Incoterms: "Free-on-board" means that the seller fulfills his obligations to deliver when the goods have passed over the ship's rails at the named port of shipment. This means that the buyer has to bear all costs and risks of or damage to the goods from this point.

¹⁹⁷ Paragraph 19.5.1 of Form M1.

151. The second category of customers are NVOCCs. These refer to companies that do not own a vessel, but have legal responsibility over transportation including issuing the bill of lading. NVOCCs use the space on vessels to transport their customers' shipments under their own bill of lading. Examples of such customers include forwarding agents, freight forwarders, and transportation and logistics companies.¹⁹⁸
152. **Ability to Self-Supply.** The Parties submitted that customers are not likely to self-supply container liner shipping services. Due to the large capacity of container ships, no single customer, or collection of five to ten customers, will have sufficient cargo volume to fill the capacity of container ships. Even if a customer is able to fill the capacity of a small container ship, it may not make economic sense to do so as the operating costs of a small container ship are significantly higher than the larger standard-sized container ships, and the customer would not be able to enjoy the frequency of service when using multiple container shipping lines to transport their goods.¹⁹⁹
153. **Ability to Switch.** The Parties noted that unless there are specific agreements entered into between customers and container liner shipping providers for the provision of container liner shipping services for a specified term, customers can switch between container liner shipping providers quickly and easily, as there exists significant choice between suppliers globally, and the processes in dealing with different container liner shipping providers are similar. Accordingly, the costs involved in switching from one container liner shipping provider to another are negligible.²⁰⁰ [§].²⁰¹
154. [§].²⁰² For example, [§].²⁰³ [§].²⁰⁴

¹⁹⁸ Paragraph 19.5.2 of Form M1.

¹⁹⁹ Paragraph 32.1 of Form M1.

²⁰⁰ Paragraph 24.4 and 24.5 of Form M1. To illustrate, the liner shipping industry is characterised by the presence of different service providers known as NVOCCs who do not own vessels but charter space on existing vessels of liner shipping companies. NVOCCs act as ship consolidators, who package, transport and deliver cargo to customers across the world. An NVOCC has contracts with different shipping companies and can change its choice of container liner shipping provider from time to time depending on the container liner shipping provider which offers it the best terms and conditions. The additional cost and time incurred in switching between container liner shipping providers is limited, as the NVOCC can make a booking for its shipment using existing contracts or by amending existing contracts. The NVOCC will then only need to inform its warehouse to adjust the necessary arrangements based on the altered booking, such as changing the destination terminal of the truck to that of the container liner shipping provider booked. The consignee will then pick up the cargo at the arrival terminal according to the assigned container liner shipping provider's instructions, which are provided before the arrival of the vessel at its destination.

²⁰¹ Paragraph 1.3 of the Parties' response dated 15 February 2017.

²⁰² Paragraph 32.2 of Form M1.

²⁰³ Paragraph 1.6 of the Parties' response dated 15 February 2017.

²⁰⁴ Paragraph 1.6 of the Parties' response dated 15 February 2017.

155. The EC had, in its recent decision in 2015 in EC Case No COMP/M.7523 – *CMA CGM/ OPDR*, noted that the frequent switching between short-sea container shipping providers is a customary feature of the industry and takes place within a relatively short time frame. Thus, a confluence of the customers’ bargaining power and the ease of switching are indicative of the degree of countervailing power in the relevant markets. The EC further found, in the same decision, that as at least some customers have buyer power and could entice entry, and given that there appears to be a lot of unused capacity in short-sea container shipping, even potential entry is likely to exert competitive pressure on prices on a given trade.²⁰⁵

Feedback from Third-Parties

156. Customers of the Parties noted that they negotiate prices and terms with the Parties and are at times, able to obtain prices and other terms different from what is initially offered.²⁰⁶ A customer explained that this is because of its sizeable and regular shipping volumes, and added that its ability to negotiate with its container liner shipping service providers is affected by general market trends.²⁰⁷
157. Another VOCC also observed that customers usually place bookings for the same shipment with several carriers and negotiate prices before committing to booking. In practice, contracts are not enforced by the VOCCs given their dependency on customers, and a significant number of its customers’ bookings were “*never loaded because the booking ultimately goes to another carrier.*”
158. A customer of the Parties explained that the usual term of its contracts with its container liner shipping service providers is one year, and that the bigger shippers usually enter into contracts on a yearly basis with the container liner shipping service providers.²⁰⁸ These customers run annual tenders for each route and prices are fixed during the term of the contract.²⁰⁹ A customer explained that it is obliged to not solicit business from alternative liner shipping service providers during the term of the contract. However, there are exit clauses that are put in place to allow this customer to seek alternative providers, for example, in the event that there is a failure of service.²¹⁰ An NVOCC similarly noted that customers generally tender their business “*regularly through a Request for Quotation to ensure that they receive best price and quality*”.²¹¹ A VOCC reflected that it does not impose

²⁰⁵ Paragraphs 32.3 and 32.4 of Form M1.

²⁰⁶ Paragraph 23 of [X] response dated 16 February 2017. Paragraph 23 of [X] response dated 16 February 2017.

²⁰⁷ Paragraph 23 of [X] response dated 16 February 2017.

²⁰⁸ Paragraph 27 of [X] response dated 22 February 2017.

²⁰⁹ Paragraph 26 of [X] response dated 16 February 2017. Paragraphs 8 and 14 of [X] response dated 22 February 2017. Paragraphs 9 and 26 of [X] response dated 1 March 2017.

²¹⁰ Paragraph 26 of [X] response dated 16 February 2017.

²¹¹ Paragraph 9 of [X] response dated 20 February 2017.

volume commitment or penalties for customers to switch suppliers and that this is generally the case in the industry.²¹²

159. On the extent to which it could provide its own alternatives to liner shipping services or sponsor alternatives services to and from Singapore, a customer submitted that it did not have any plans to self-supply and that its strategy is to work through the market to obtain the most competitive prices for required services.²¹³ On the same question, another manufacturer opined that it will not provide its own liner services, but will approach other liners to see if they are able to provide services that cover the same routes as the Parties.²¹⁴ An NVOCC also opined that it cannot provide its own alternative to liner shipping services or sponsor an alternative.²¹⁵ Another NVOCC responded that it relies on available liner services and would consider new services that become available.²¹⁶ Only one customer opined that his company has some ability to provide alternatives to container liner shipping services or sponsor alternative container liner shipping services to and from Singapore.²¹⁷

CCS's Assessment

160. Considering Third-Parties' feedback and the Parties' submission, CCS is of the view that, although there is limited evidence of countervailing power being exercised through a credible threat of customers to self-supply, a significant number of customers (BCOs and NVOCCs) demonstrate buyer power through their procurement processes.

VIII. Competition Assessment

(a) Non-coordinated effects

161. Non-coordinated effects may arise where, as a result of the Transaction, the merged entity finds it profitable to raise prices (or reduce output or quality) because of the loss of competition between the merged entities.²¹⁸

The Parties' Submissions

162. The Parties submitted that as the container liner shipping industry is a commoditised industry, any supplier providing services in a particular trade lane is a competitor and a next best alternative to each other.²¹⁹

²¹² Paragraph 20 of [X] response dated 20 February 2017.

²¹³ Paragraph 24 of [X] response dated 1 March 2017.

²¹⁴ Paragraph 25 of [X] response dated 22 February 2017.

²¹⁵ Paragraph 24 of [X] response dated 28 February 2017.

²¹⁶ Paragraph 38 of [X] response dated 20 February 2017.

²¹⁷ Paragraph 24 of [X] response dated 16 February 2017.

²¹⁸ Paragraph 5.21 of *CCS Guidelines on the Substantive Assessment of Mergers 2016*.

²¹⁹ Paragraph 33.1 of Form M1.

163. The Parties compete with each other, and with other competitors globally, on a range of factors which end-customers take into consideration in their choice of container liner shipping providers. Such factors include [§<].²²⁰ The JV Co will continue to compete with global competitors on the same basis as above. [§<].²²¹
164. The Parties submitted that non-coordinated effects will not arise in the relevant markets as a result of the Transaction affecting Singapore for the following reasons:
- a. the container liner shipping market is highly competitive, in view of the multitude of global competitors who are able to exert a competitive constraint on the JV Co;
 - b. the barriers to entry and expansion in the container liner shipping market are not prohibitive, as competitors or potential competitors are easily able to offer new services or expand their current services by adding new ships, new routes, or new ports of call, or entering into slot swapping agreements;
 - c. [§<] and any switching costs involved are neither high nor prohibitive such that customers would be deterred from switching suppliers. Customers can, and do in fact, switch liner shipping providers. In relation to the short sea container liner shipping services specifically, customers can in fact switch between competing services in a matter of days.;
 - d. customers are able to, and do, obtain container liner shipping services from a number of container liner shipping providers, and are not restricted by the identities of any specific container liner shipping provider;
 - e. the key customers of liner shipping services are large multinational corporations who are well-informed, are likely to be able to exercise countervailing buyer power on liner shipping providers and by credibly threatening to switch to alternative providers of liner shipping services or sponsor new entry; and
 - f. existing container liner shipping providers also enter into joint venture arrangements similar to the Transaction, or joint service agreements, and are able to exercise significant competitive constraints on the JV Co.²²²

Feedback from Third-Parties

165. Feedback from customers of the Parties evidenced that they have contracts for the services of other container liner shipping service providers for the same routes

²²⁰ Paragraph 33.2 of Form M1.

²²¹ Paragraph 33.3 of Form M1.

²²² Paragraph 34.3 of Form M1.

provided by the Parties.²²³ For example, a customer of the Parties concurrently engages the services of the Parties' competitors such as Maersk, APL, CMA CGM, PIL, Hapag-Lloyd and MSC, and also considers container liner shipping providers such as CMA CGM, Maersk and APL as alternatives to NYK's and MOL's container liner shipping services for any route to and from Singapore.²²⁴ This is corroborated by another customer who noted that it currently uses ten to twelve liner shippers, and it has also used other container liner shipping providers as alternatives to the Parties such as APL, Hapag Lloyd, Maersk and to a limited extent CMA CGM.²²⁵ A customer noted that it works with more than one VOCC on every port pair that it requires, hence switching is easy.²²⁶ Another customer of the Parties noted that there are "*at least 3 to 4 backups*" i.e. alternative providers which they can switch to "*within 24 hours*" and highlighted that the Parties compete globally with the bigger players i.e. Maersk, CMA CGM and MSC.²²⁷ An NVOCC noted that it takes on a "*multi-carrier approach*", i.e. it procures container liner shipping services from two of the Parties and twenty-one other VOCCs, "*the most prominent being APL, CMA-CGM, MSC, Maersk, Hapag-Lloyd and Hamburg Süd*". It also opined that it is "*rather easy to change carriers*".²²⁸

166. Third-Parties reflected that there is not much differentiation in terms of specific services amongst VOCCs²²⁹ and that container liner shipping is a highly commoditized product.²³⁰ A VOCC observed that its customers, i.e. shippers, have a number of carriers to choose from and tend to switch VOCCs for minor differences in price.²³¹ Another VOCC opined that as container liner shipping service is a highly commoditized product, there is perfect competition in the market and customers are "*spoilt for choices on the shipping lines they can choose to ship their cargo today, and this trend is likely to continue after the proposed JV.*"²³² In relation to the response of customers to increase in prices for container liner shipping services, a NVOCC opined that there is "*rather high cross price elasticity*" as customers tender their business regularly through requests for quotation.²³³
167. A customer noted that the Parties do not dominate any particular routes to and from Singapore. It commented that the Parties do not focus on or have an advantage on niche areas, e.g. Singapore-Japan routes, and that large liners ply the same routes that the Parties are active in. The customer added that the JV Co would not be

²²³ Paragraph 5 of [X] response dated 28 February 2017. Paragraph 5 of [X] response dated 16 February 2017. Paragraph 5 of [X] response dated 1 March 2017. Paragraph 5 of [X] response dated 22 February 2017. Paragraphs 4, 7 and 19 of [X] response dated 16 February 2017.

²²⁴ Paragraphs 5, 14 and 15 of [X] response dated 16 February 2017.

²²⁵ Paragraph 15 of [X] response dated 22 February 2017.

²²⁶ Paragraph 7 of [X] response dated 1 March 2017.

²²⁷ Paragraphs 4, 7 and 19 of [X] response dated 16 February 2017.

²²⁸ Paragraphs 10, 22, 31 and 32 of [X] response dated 20 February 2017.

²²⁹ Paragraph 26 of [X] response dated 20 February 2017.

²³⁰ Paragraph 15 of [X] response dated 20 February 2017.

²³¹ Paragraph 9 of [X] response dated 20 February 2017.

²³² Paragraphs 15 and 20 of [X] response dated 20 February 2017.

²³³ Paragraph 9 of [X] response dated 20 February 2017.

significant enough to impact prices of container liner shipping services to and from Singapore as changes in prices are driven largely by market conditions and the bigger players in the market.²³⁴ A manufacturer observed that while KL is strong in Asia-USA, MOL is strong in intra-Asia, and NYK is strong in Asia-Europe.²³⁵ An NVOCC similarly noted that “*the JV Co will continue to face stiff competition from VOCCs operating to and from Singapore and it is unlikely that the JV Co will impact prices*”.²³⁶

168. An NVOCC opined that should the merger proceed, it will still be as “*easy as [it is] today*” for customers to switch to competitors of the JV Co.²³⁷
169. Third-Parties also noted that major VOCCs are also active in the Singapore market, providing good alternatives to the Parties’ services²³⁸ and are able to reallocate capacity into the region.²³⁹ Further, as noted at paragraph 110 above, there is overcapacity in the market currently. VOCCs also noted that the majority of the global container liner shipping providers already have a strong presence in Singapore and there are a number of smaller/regional carriers which could well expand their presence with new services to and from Singapore.²⁴⁰ Customers also observed that there is “over-supply” in the industry in recent years.²⁴¹ The Alphaliner November 2016 Monthly Monitor estimates idle capacity to be [0-10]% on the basis of cellular TEU capacity and [0-10]% on the basis of cellular vessel count.²⁴²

CCS’s Assessment

170. CCS notes that the container liner shipping industry, which is characterized by slot and vessel sharing arrangements in the Relevant Markets, exhibits limited product differentiation across liners. The information available to CCS does not suggest that the Parties are close competitors in any of the Relevant Markets.
171. CCS also notes from the Parties and Third-Parties that there is overcapacity in the market currently. Container liner shipping service providers do not face capacity constraints and are able to easily expand their services in the Relevant Markets.

²³⁴ Paragraphs 4 and 18 of [X] response dated 16 February 2017.

²³⁵ Paragraph 4 of [X] response dated 22 February 2017.

²³⁶ Paragraph 18 of [X] response dated 28 February 2017.

²³⁷ Paragraph 30 of [X] response dated 20 February 2017.

²³⁸ Paragraphs 4, 7 and 19 of [X] response dated 16 February 2017. Paragraph 3 of [X] response dated 20 February 2017.

²³⁹ Paragraph 11 of [X] response dated 20 February 2017. Paragraph 12 of [X] response dated 20 February 2017.

²⁴⁰ Paragraph 24 of [X] response dated 20 February 2017. Paragraph 24 of [X] response dated 20 February 2017.

²⁴¹ Paragraph 2 of [X] response dated 16 February 2017. Paragraph 2 of [X] response dated 16 February 2017.

²⁴² Slide 23 of Annex 10 of Form M1.

172. Given the above, it is unlikely that non-coordinated effects will arise post-Transaction in any of the Relevant Markets.

(b) Coordinated effects

173. A merger may also lessen competition substantially by increasing the possibility that, post-Transaction, firms in the same market may coordinate their behavior to raise prices, or reduce quality or output. Given certain market conditions, and without any express agreement, tacit collusion may arise merely from an understanding that it will be in the firms' mutual interests to coordinate their decisions. Coordinated effects may arise where a merger reduces competitive constraints from actual or potential competition in a market, thus increasing the probability that competitors will collude or strengthening a tendency to do so.²⁴³

The Parties' Submissions

174. The Parties submitted that the Transaction will not give rise to coordinated effects in the relevant markets affecting Singapore, among others, in view of the following:
- a. there are numerous competitors and competing container liner shipping alliances of varying sizes, combinations and scale of operations, such that it would not be possible for the JV Co to arrive at an alignment or coordination of its behaviour with other competitors;
 - b. the Parties compete on a range of factors [X], which customers take into account in varying combinations and weightage, and which would be difficult to coordinate with competitors;
 - c. the barriers to entry and expansion in the container liner shipping market are not prohibitive, as competitors are easily able to offer new services or expand their current services by adding new ships, new routes, or new ports of call, or entering into slot swapping agreements, and any coordinated behaviour may be easily disrupted by competitors;
 - d. there is significant spare capacity in the container vessel chartering market globally and there are many container ships owned by competitors which are not deployed and idle. Accordingly, competitors are able to easily expand the scope and frequency of their services, if there is demand.; and
 - e. the presence of large sophisticated customers would give rise to significant countervailing buyer power, which may be exercised by such customers in response to any coordinated behaviour.²⁴⁴

²⁴³ Paragraph 5.35 of *CCS Guidelines on the Substantive Assessment of Mergers 2016*.

²⁴⁴ Paragraph 35.2 of Form M1.

175. The Parties also submitted that [REDACTED].²⁴⁵

CCS's Assessment

176. The Competition (Block Exemption for Liner Shipping Agreements) Order exempts liner shipping agreements from section 34 of the Competition Act until 31 December 2020 under specified conditions and obligations. In particular, 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 share of the parties to the agreement exceeds 50 per cent, 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 CCS.

177. Given the large number of liners and low market concentration that would continue to exist post-Transaction, CCS is of the view that the Transaction is unlikely to increase the possibility of anticompetitive coordination, and thus coordinated effects are unlikely to arise post-Transaction in any of the Relevant Markets.

(c) Summary

178. Given the above, CCS is of the view that the Transaction is unlikely to lead to an SLC in any of the Relevant Markets.

IX. Efficiencies

The Parties' Submissions

179. Through the Transaction, the Parties propose to extend their global reach and enhance their liner network by:

- a. creating more synergies and enhancing operational efficiency by integrating each company's best practices. [REDACTED];
- b. achieving greater economies of scale by integrating the businesses of the Parties set out in paragraph 2 above. [REDACTED];
- c. developing cutting edge technology for the services provided; and
- d. stabilising profitability of the business of the Parties.²⁴⁶

²⁴⁵ Paragraph 4.4 and 4.5 of the Parties' response dated 14 February 2017.

²⁴⁶ Paragraph 42.1 of Form M1.

180. Further, the Parties noted that CCS’s response to the public consultation on its proposed recommendation to extend the BEO to 31 December 2020 includes the following:

“(i) the connectivity of liner shipping services available in Singapore generates considerable benefits, both directly and indirectly to Singapore, including providing a higher degree of connectivity and service choice for Singapore’s importers and exports; and

(ii) operational agreements, by facilitating the sharing of vessels among liners, increase the utilisation of space on vessels, enable more frequent services.”²⁴⁷

181. The Parties submitted that the Transaction similarly leads to the aforementioned benefits.²⁴⁸

CCS’s Assessment

182. CCS notes that in the assessment of net economic efficiencies, merger parties are required to show that these efficiencies will be sufficient to outweigh the adverse effects resulting from SLC caused by the merger.²⁴⁹
183. Given that the above competition assessment does not point to an SLC, CCS is of the view that it is not necessary to make an assessment on the claimed efficiencies by the Parties.

X. Ancillary Restraints

184. Paragraph 10 of the Third Schedule to the Act states that “the section 34 prohibition and the section 47 prohibition shall not apply to any agreement or conduct that is directly related and necessary to the implementation of a merger” (the “**Ancillary Restriction Exclusion**”). In order to benefit from the Ancillary Restriction Exclusion, a restriction must be directly related and necessary to the implementation of the merger if it is to benefit from the exclusion.²⁵⁰
185. In order to be directly related, the restriction must be connected with the merger, but ancillary or subordinate to its main object.²⁵¹ A restriction is not automatically deemed directly related to the merger simply because it is agreed at the same time as the merger or is expressed to be so related. If there is little or no connection with the merger, such a restriction will not be ancillary.²⁵² In determining the necessity

²⁴⁷ Paragraph 42.2 of Form M1.

²⁴⁸ Paragraph 42.3 of Form M1.

²⁴⁹ Paragraphs 7.3 of *CCS Guidelines on the Substantive Assessment of Mergers 2016*.

²⁵⁰ Paragraph 9.6 of *CCS Guidelines on the Substantive Assessment of Mergers 2016*.

²⁵¹ Paragraph 9.7 of *CCS Guidelines on the Substantive Assessment of Mergers 2016*.

²⁵² Paragraph 9.9 of *CCS Guidelines on the Substantive Assessment of Mergers 2016*.

of the restriction, considerations such as whether its duration, subject matter and geographical field of application are proportionate to the overall requirements of the merger will also be taken into account.²⁵³

The Parties' Submissions

Non-compete obligations

186. Pursuant to [X], the Parties and their respective subsidiaries will be prevented from [X] in competition with the JV Co:-

- a. for [X] of the joint venture; and
 - b. for [X] from the date on which a Party ceases to be a shareholder of the JV Co.²⁵⁴
- (collectively, the “**Non-compete Obligations**”)

187. Specifically, [X] states that:-

“[X].”²⁵⁵

188. The Parties submitted that the Non-compete Obligations are directly related to the JV and is ancillary to the subject of the JV. The Parties submitted that the restriction is necessary for the implementation of the JV in order to allow the Parties to protect the value of the investments by the Parties into the JV by ensuring that each Party will focus its efforts on the JV [X]. This will ensure that the JV will receive the full benefit of the goodwill of the Parties.²⁵⁶

189. The Parties further submitted that the Non-compete Obligations in [X] are directly related to and do not exceed the scope of the JV. The Non-compete Obligations applies only to activities that are [X] of the JV Co.²⁵⁷

Non-compete for [X] of the joint venture

190. The Parties submitted that the non-compete in relation to [X], is required in order to protect the value of the joint venture.²⁵⁸

191. In this regard, the Parties refer to the position taken by the EC [X], where the EC had stated that non-competition obligations between the parent undertakings and a joint venture can be regarded as directly related and necessary to the implementation of the concentration [X].²⁵⁹

²⁵³ Paragraph 9.10 of *CCS Guidelines on the Substantive Assessment of Mergers 2016*.

²⁵⁴ Paragraph 43.2 of Form M1.

²⁵⁵ Paragraph 43.3 of Form M1.

²⁵⁶ Paragraph 43.5 of Form M1.

²⁵⁷ Paragraph 43.8 of Form M1.

²⁵⁸ Paragraph 43.6 of Form M1.

²⁵⁹ Paragraph 43.6 of Form M1.

192. In its decision practice in EC Case No. IV/M.1636 – *MMS / DASA / Astrium*, the EC found that the non-compete underlies the lasting withdrawal of the parents and their parent companies from the scope of business exclusively assigned to the joint venture. The EC stated that the non-compete was considered an ancillary restriction so long as the parent companies have a controlling interest in the joint venture or its parent companies.²⁶⁰

Non-compete for [X] from the date on which a Party ceases to be a shareholder of the JV Co

193. In relation to the duration of the non-compete for [X] from the date on which a Party ceases to be a shareholder of the JV, the Parties submitted that it is necessary for the Transaction to proceed on the basis that there is a need to protect the remaining Parties' interests in the JV against competitive acts facilitated by the exiting Party's privileged access to the know-how and goodwill transferred to or developed by the JV.²⁶¹ The Parties also noted that the Post-JV non-compete is necessary to more effectively prevent any one of the Parties, while being a shareholder of the JV, from diversifying its investments and resources away from the JV in preparation to commence its own competing business immediately after ceasing to be a shareholder of the JV.²⁶²
194. The Parties are transferring their current "know-how" to the JV and the JV is concurrently developing and sharing know-how and confidential information [X] through the JV's on-going transactions. The Parties, as parents to the JV Co, accordingly, will have privileged access to the confidential information and know-how of, as well as goodwill developed by, the JV Co during the duration of the JV Co. The Post-JV non-compete accordingly ensures that if any of the Parties is to withdraw from the JV Co, the withdrawing Party is not able to use its privileged access to the confidential information and know-how of, as well as goodwill developed by, the JV Co, to compete against the JV Co, for the duration of the Post-JV non-compete. The Parties submitted that this is akin to the principles adopted by the EC, in EC Case COMP/39736 – *Siemens/Areva*, that a post-joint venture non-compete was necessary to protect Areva SA against facilitated competition by Siemens AG.²⁶³
195. In the absence of the Post-JV non-compete, the Parties submitted that their incentives to provide the JV Co with the necessary support and substantial investments will be undermined, which would affect the ability of the JV Co to proceed, as the Parties have no assurance that the JV Co would be protected from facilitated competition from a withdrawing Party, and no assurance that the Parties remain committed to developing the JV Co. The Parties added that as customers are able to switch between container liner shipping providers quickly and easily,

²⁶⁰ Paragraph 43.7 of Form M1.

²⁶¹ Paragraph 43.11 of Form M1.

²⁶² Paragraph 3.2 of the Parties' response dated 15 February 2017.

²⁶³ Paragraph 3.3 of the Parties' response dated 15 February 2017.

the Post-JV non-compete is necessary to protect the JV Co from facilitated competition by the withdrawing Party, and to ensure the commitment of the Parties to developing the JV Co.²⁶⁴

196. The Parties further submitted that the duration of [X] for the Post-JV non-compete is necessary and not disproportionate to protect the legitimate interest of the JV Co as the confidential information of the JV Co, to which the Parties have privileged access, as noted in paragraph 194 above, is likely to only become less current and competitively sensitive after a period of [X]. The duration of the Post-JV non-compete is also necessary, in view of the significant investments to be made by each Party in the JV, to ensure that the Parties are committed to developing the JV Co and prevent any one of the Parties from diverting their investments and resources away from the JV Co to commence its own competing business once it has withdrawn from the JV Co.²⁶⁵

CCS's Assessment

197. *CCS's Guidelines on the Substantive Assessment of Merger 2016* state that non-compete clauses, if properly limited, are generally accepted as essential if the purchaser is to receive the full benefit of any goodwill and/or know-how acquired with any tangible assets. CCS will consider the duration of the clause, its geographical field of application, its subject matter and the persons subject to it. Any restriction must relate only to the goods and services of the acquired business and apply only to the area in which the relevant goods and services were established under the previous/current owner.²⁶⁶

Non-compete for [X] of the joint venture

198. CCS is of the view that the non-compete for [X] of the joint venture is directly related and necessary to the implementation of the Transaction and in the context of the Transaction, constitutes ancillary restrictions which fall within the exclusion under paragraph 10 of the Third Schedule of the Act.

Non-compete for [X] from the date on which a Party ceases to be a shareholder of the JV Co

199. CCS notes that in EC Case COMP/39736 – *Siemens/Areva*, the EC took into consideration the restrictiveness of the means, the product scope, the geographic scope and the duration when assessing proportionality. In particular, the EC highlighted that the post-joint venture non-compete obligation can only be justified as long as the confidential business information is not outdated, is too uncertain to be of value or is not in the public domain. The EC also considered the issue of protection against facilitated competition, which relates to possible justification of protection against the competition where a merging party exploits the confidential information it obtains through the joint venture.

²⁶⁴ Paragraphs 3.6 and 3.7 of the Parties' response dated 15 February 2017.

²⁶⁵ Paragraph 3.4 of the Parties' response dated 15 February 2017.

²⁶⁶ Paragraph 9.12 of *CCS's Guidelines on the Substantive Assessment of Merger 2016*.

200. CCS is of the view that geographical field, subject matter and the persons subject to this non-compete obligation is directly related and necessary to the implementation of the Transaction. In particular, this non-compete obligation may objectively regulate the Parties' incentives to provide the JV Co with the necessary support and substantial investments and assures the Parties that the JV Co would be protected from facilitated competition from a withdrawing Party.
201. CCS does not agree with the Parties' argument that the duration of [X] for the Post-JV non-compete is necessary and not disproportionate to protect the legitimate interest of the JV. The Parties have not explained why such confidential information²⁶⁷ is less current and less competitively sensitive after a period of [X].
202. CCS notes that prices are decided according to market conditions and may include a premium based on specific customer requests. Prices typically remain valid for the length of the contracts. The Parties' customers consist of three types, namely (i) [X] customers, (ii) [X] customers with [X] contracts which are valid for [X], and (iii) customers with [X] contract. However, as noted in paragraphs 153 and 154 above, as customers [X]. [X] as the customers are able to easily switch between container liner shipping service providers.
203. The Parties have not sufficiently justified how the duration of [X] is necessary to the implementation of the JV. Given that the length of the contracts is [X], and also that customers are able to switch easily between providers [X], CCS is of the view that a duration of [X] is disproportionate to protect the legitimate interest and goodwill accrued by the JV Co. In this regard, CCS notes that the longest period of time which the confidential information any Party through the JV would remain confidential and commercially sensitive is [X].
204. In view of the above, CCS considers that a non-compete obligation with a duration of [X] from the date on which a Party ceases to be a shareholder of the JV Co is directly related and necessary to the implementation of the Transaction.

²⁶⁷ Confidential information includes [X]

XI. Conclusion

205. For the reasons above and based on the information available, CCS has assessed that the Transaction will not infringe section 54 of the Act if carried into effect.
206. In accordance with section 57(7) of the Act, this decision shall be valid for a period of one year from the date of this decision.



Toh Han Li
Chief Executive
Competition Commission of Singapore