

**PUBLIC CONSULTATION ON PROPOSED BLOCK  
EXEMPTION ORDERS FOR LINER SHIPPING AGREEMENTS**

# **CCS CONSULTATION ON PROPOSED BLOCK EXEMPTION ORDERS FOR LINER SHIPPING AGREEMENTS**

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## **INTRODUCTION**

1. Section 34 of the Competition Act (“Act”) prohibits agreements, decisions and concerted practices that appreciably prevent, restrict or distort competition in Singapore (“section 34 prohibition”).
2. An agreement that falls within the scope of section 34 may, on balance, have a net economic benefit. This is if it contributes to improving production or distribution, or promoting technical or economic progress, and does not impose on the undertakings/businesses concerned restrictions which are not indispensable to the attainment of those objectives, or afford the undertakings/businesses concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question. This is spelt out in section 41 of the Act. Section 36 of the Act provides that where the Competition Commission of Singapore (“the Commission”) is of the opinion that a particular category of agreements is likely to satisfy such requirements, it may recommend to the Minister for Trade and Industry to make a block exemption order exempting that category of agreements from the section 34 prohibition. Such an exemption is known as a block exemption.
3. This consultation paper explains the rationale for and the proposed operation of the Block Exemption Order (BEO) for liner shipping agreements. The exemption applies only in respect of the section 34 prohibition. The exemption does not apply to the section 47 prohibition (abuse of a dominant position).
4. The Commission invites parties that may be affected by the BEO to comment on any concerns they have about the design or potential impact of the proposed BEO for liner shipping agreements.

## **RATIONALE FOR THE BEO**

5. Singapore, with its extensive network of liner shipping connections, is a global hub for liner shipping operations. The presence of a large number of major shipping companies has important flow-through benefits for the Singapore economy.

6. Exemptions from certain provisions of competition law have long been a feature of the liner industry in major jurisdictions around the world. Concerns about maintaining the stability of prices<sup>1</sup>, the availability of reliable services, and facilitating technical and operational cooperation among liner operators have provided the main rationale for the exemption of liner shipping agreements in other jurisdictions.

7. However, the exemptions in the European Union<sup>2</sup> (EU) and Australia<sup>3</sup> are being reviewed and the liner industry may lose its present competition law

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<sup>1</sup> The European Commission has sought to define rate stability in a number of decisions. In paragraphs 127 and 128 of the FEFC decision (Commission Decision of 21 December 1994 in Case No IV/33.218 - *Far Eastern Freight Conference* (OJ L 378, 31.12.1994, p. 17) the Commission stated that:

*“A conference brings stability to the trades it affects by fixing a uniform tariff which serves as a reference point for the market. Prices set in this way are likely to remain unchanged for a longer period of time than if they are set by individual lines. This reduction in the price fluctuations which would be expected in a normally competitive market may benefit shippers by reducing uncertainty as to future trading conditions.*

*The stability envisaged by Regulation (EEC) No 4056/86 has the consequent effect of assuring shippers of reliable services. Liner shipping services are by their nature regular in the sense of following an evenly spread timetable. Reliable services are those which are of a reasonable quality, such that the shippers' goods come to no harm, and at the same price irrespective of which day and which line is chosen to carry the cargo. Reliability in the supply of transport services is the maintenance over time of a scheduled service, providing shippers with the guarantee of a service suited to their needs.”*

*In the TAA decision (Commission Decision of 19 October 1994 in Case No IV/34.446 - Trans-Atlantic Agreement (OJ L 376, 31.12.1994, p. 1) the European Commission stated at paragraphs 388 and 389 that:*

*“Price stability is the maintenance of freight rates at a more or less constant level by liner conferences, in accordance with a set structure ... over a substantial period of time. This stability can be contrasted with the volatility that the market would naturally generate in the absence of conference agreements. In the Commission's view, price stability may constitute an objective within the scope of Article [81](3) of the Treaty for the following reasons:*

- stability of rates for scheduled services enables shippers to know reasonably far in advance the cost of transporting their products and therefore their selling price on the market of destination, whatever the time, vessel or conference ship owner involved,*
- stability of rates enables ship owners to forecast their income more accurately and thus makes it easier to organize regular, reliable, adequate and efficient services.”*

<sup>2</sup> DG Competition (of European Commission) review of Regulation 4056/86 (Consultation document of 27 March 2003 and DG Competition (of European Commission) review of Regulation 823/2000 (Consultation document of 28 May 2004).

<sup>3</sup> ACCC Review of Part X.

immunity for certain types of liner shipping agreements (in particular conference-type activities) in these jurisdictions. This will have implications for liner operators that operate on such routes through Singapore. The nature and timing of such changes in other jurisdictions are uncertain, although some changes are expected within the next 2 years<sup>4</sup>.

8. Shipping is a global trade and the Commission is mindful of the larger regulatory environment within which different stakeholders in the shipping industry operate, as liner operators will generally organize their agreements to comply with the rules of the strictest country on a particular trade route. After due consideration of the nature of the shipping trade, international maritime developments, Singapore's market context<sup>5</sup> and inputs from liner operators and shippers, the Commission is of the view that the proposed BEO will put in place a regulatory environment broadly aligned with that currently in place for major jurisdictions. Such a block exemption will provide certainty to the shipping industry.

9. The proposed BEO will align Singapore's competition law regime for the maritime sector with that of our other major trading partners, including the EU, USA, Australia and Japan. In designing the BEO, the Commission took into account the following, amongst other considerations: (i) it should be underpinned by a robust competition/economic efficiency framework; ii) it must not place unnecessary administrative burden, such as increased compliance costs, on the industry; and (iii) it should provide sufficient flexibility to respond to international maritime developments.

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

- (a) agreements which promote the rationalization of liner shipping operations by means of technical, operational and commercial arrangements are facilitated; and
- (b) exporters and importers have ongoing access to liner shipping services of adequate frequency and reliability at prices that are internationally competitive.

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<sup>4</sup> European Commission Press Release IP/05/1586.

<sup>5</sup> In performing its functions and duties, the Commission is required to have regard to the economic, industrial and commercial needs of Singapore, and to maintain the efficient functioning of the markets in Singapore (section 6(2)(b) and (c)).

## **APPROACH OF THE PROPOSED BEO**

11. The various agreements between liner operators sometimes deal with operational aspects whilst others involve discussion on the commercial aspects of liner operations. The Commission is proposing a single BEO to cover all relevant types of liner shipping agreements that are to be exempt from the section 34 prohibition, subject to a list of conditions. This approach is intended to reduce the potential for disputes over taxonomy as future collaborative arrangements may not fall neatly within the current definition of types of liner agreements, such as conference, consortia and discussion agreements. It will also avoid imposing unnecessary restraints on carriers that wish to innovate on shipping arrangements in ways that have little or no anti-competitive effect. This is consistent with our general regulatory approach of focusing on competitive effects rather than the form of the agreement.

12. The proposed BEO will permit a wide range of liner activities including agreement between the liner operators on detailed capacity decisions and prices subject to certain conditions. Where the aggregate market share of the parties to the agreement exceeds 50 per cent (“market share limit”), parties to the agreement (covering that market) will need to comply with certain additional conditions relating to filing and publication of relevant information on tariffs for the market in which the market share limit is exceeded.

13. Agreements that meet the conditions set out in the BEO are, prima facie, considered to have met the requirements under section 41 of the Act. The Commission will generally not conduct a further in-depth examination of such agreements. However, if there has been a breach of condition(s), or where the agreement has effects on competition that are incompatible with section 41 of the Act, the exemption may be cancelled with respect to that agreement.

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

15. The details of the proposed BEO are elaborated in the following section.

## **THE PROPOSED BLOCK EXEMPTION ORDER**

### **Application of the Proposed BEO**

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

### **General Approach and Structure of the Proposed BEO**

17. The proposed BEO deals with its commencement, duration, definition of terms specific to the BEO, the conditions for exemption, a grace period in connection with the market share limit and the circumstances which could lead to cancellation of the exemption in relation to particular liner shipping agreements.

18. All liner shipping agreements (as defined below) must satisfy a number of conditions to qualify for exemption under the BEO. This is explained in more detail in the sub-section on exempted agreements below.

### **Commencement and Duration**

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

### **Definitions**

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

#### **Liner shipping agreement**

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

#### **Liner shipping services**

22. Liner shipping services are defined as the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an

occasional basis, to any transport user against payment. Such services include inland carriage of goods occurring as part of through transport. Bulk and tramp shipping are not included.

### Through transport

23. Through transport is defined as the continuous transportation by a combination of sea and inland carriage between origin and destination for which a single amount is charged by a liner operator and which is offered or performed by one or more carriers, at least one of which is a liner operator.

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

## **Exempted Agreements**

### Application to liner shipping agreements in general

25. To qualify for exemption, a liner shipping agreement must adhere to the conditions in paragraph 4 (1) of the proposed BEO. These include allowing the parties to the agreement:

- to offer on the basis of individual confidential contracting their own service arrangements; and
- to withdraw from the agreement on giving an agreed period of notice without financial or other penalty<sup>6</sup> such as, in particular, an obligation to cease providing liner shipping services in a market, whether or not coupled with the condition that such activity may be resumed only after a certain period has elapsed.

and must not require liner operators to undertake any of the following activities:

- mandatory adherence to a tariff; and

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<sup>6</sup> The relevant period is to be agreed between the parties, and is not specified in the BEO.



- the disclosure, whether to other liner operators or otherwise, of confidential information concerning service arrangements.

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

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

27. Where the market share of the parties to a liner shipping agreement exceeds the market share limit, they are required to observe the additional conditions set out in paragraph 4(2) of the proposed BEO if they wish to enjoy the benefit of the exemption. These are:

- filing a copy of their liner shipping agreement and any variations or amendments thereto with the Commission by 31 July 2006, or not less than 14 days prior to the agreement, variation or amendment taking effect;
- making available upon request to the Commission particulars such as the details of the transport terms, any tariff, and the structure, service level offerings and other aspects of the operation under the agreement relevant to the market;
- making available to transport users the above particulars upon request at a reasonable cost in paper or electronic form, and either by examination of such documents at the offices in Singapore of the parties or their agents, or at a publicly available website;
- notifying any amendments or variations to the above particulars to the Commission and transport users not less than 14 days prior to the amendments or variations taking effect.

28. These additional conditions have been included to ensure that transport users and the Commission are kept aware of the details of and changes to the liner shipping agreements, where the aggregate market share of the parties exceed the market share limit. This is because such agreements could potentially pose greater competition concerns.

29. There is no requirement to lodge liner shipping agreements with the Commission or notify the details of agreements where the aggregate market share

of the parties does not exceed the market share limit. The Commission is of the view that such agreements, which fulfil the conditions in paragraph 4 (1) of the proposed BEO pose minimal risks of appreciable adverse effect on competition. This approach will also minimise administrative costs for parties to liner shipping agreements.

### **Market Definition and Exceeding the Market Share Limit**

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

31. If an agreement relates to more than one market and if the market share limit is exceeded in one market but not in another market covered by the agreement, the agreement will be exempt in the market where the limit was exceeded only if the additional conditions under paragraph 4(2) of the proposed BEO are fulfilled. With regard to the market where the limit was not exceeded, the agreement will be exempt as long as the conditions under paragraph 4(1) of the proposed BEO are satisfied.

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

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

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

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

fluctuations in the aggregate market share of parties to the liner shipping agreement are unlikely to have significant long term impact on the market.

35. The definition of market is deliberately broad because the concept of a market for competition analysis differs from the standard commercial understanding of a market. The proposed BEO does not specify how a market will be defined, i.e. the extent or geographic coverage of the market, as guidance has been provided by the Commission earlier on how markets can be defined. (Please refer to the CCS Guideline on Market Definition, December 2005). There is also extensive jurisprudence in the EU<sup>7</sup> on the definition of markets for liner shipping services to which interested parties may refer. Consistent with its general approach on defining markets in a competition analysis, the Commission will consider generally accepted competition law principles and case law when defining markets on a case-by-case basis. To provide some practical guidance, the definition of markets may include the following geographic definitions:

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

36. However, the markets may be wider (or narrower) than these definitions to the extent that either demand or supply side considerations 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’.

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

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<sup>7</sup> European Commission decisions on maritime transport can be found at <http://europa.eu.int/comm/competition/antitrust/legislation/maritime>.

## **Grace Period**

38. There will also be a grace period for parties to fulfil the conditions in paragraph 4(2) of the BEO if the market share limit is exceeded. (Please refer to paragraph 5 of the proposed BEO). This is to ensure that liner operators have reasonable time to fully assess and address the competition law implications for their agreements, and to comply with the additional conditions in order to benefit from the exemption.

## **Effectively Permitted Behaviours**

39. In summary, the proposed BEO will effectively allow parties to liner shipping agreements to discuss and agree on the rationalisation and management of capacity and prices, subject to conditions in paragraph 4 of the proposed BEO. Price is defined in the proposed BEO to mean the price for which a liner operator performs or offers to perform liner shipping services or any part of liner shipping services. Prices include ancillary charges (including surcharges<sup>8</sup>) for such services as liner operators are allowed to bundle inland haulage services with maritime services as part of through transport (see paragraphs 23-24 above). This approach is consistent with regulatory developments in other major jurisdictions, in particular the United States.

40. Allegations of practices that are being undertaken as an abuse of a dominant position will be considered by the Commission under section 47 of the Act.

## **Coverage is not Restricted to the Carriage of Cargo by Container**

41. The proposed BEO applies to all forms of liner shipping agreements and is not restricted to liner shipping services in a particular form such as container cargo. This means that exempted liner shipping agreements can also cover carriage of cargo by means other than containers, for example, car carrier services. This

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<sup>8</sup> The ocean tariff rate has traditionally been kept separate from those charges that are generally not under the control of the conference. While these charges have generally become known as surcharges, it is useful to distinguish between the two types of charges:

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

approach reflects the view that it is desirable to have a BEO that allows liner operators participating in all forms of liner shipping to collaborate to bring about technical, operational and commercial improvements in their services.

### **Cancellation of the Exemption**

42. Paragraph 6 of the proposed BEO provides for the cancellation of the exemption in respect of a liner shipping agreement. This is in line with the provisions of section 37 (2) of the Act on cancellation of exemption.

43. With reference to paragraph 6 (2)(b) of the proposed BEO, an example of a situation where an agreement would have effects incompatible with the provisions of section 41 of the Act would be concerted behaviour (including tacit concerted behaviour) by the parties to an agreement whereby they effectively disclose confidential information. To elaborate, individual voluntary disclosure of confidential information concerning service agreements is allowed under the BEO, as this is not considered likely to have an appreciable anti-competitive effect. However, concerted behaviour including tacit behaviour that effectively amounts to disclosure of confidential information would eliminate the scope of independent contracting and pricing behaviour. This is contrary to the intention of the condition for exemption in paragraph 4 (1)(c)(ii) of the proposed BEO which states that the liner shipping agreement must not require disclosure of confidential information concerning service arrangements.

44. If the Commission has cause to be concerned about behaviour of this or other nature producing adverse effects on competition, it may cancel the exemption for a particular liner shipping agreement on the ground that it is in breach of paragraph 6 (2)(b) of the proposed BEO, i.e. agreement/concerted behaviour producing effects that are incompatible with section 41 of the Act.

45. Whether or not the parties to a liner shipping agreement exceed the market share limit, the Commission may, where appropriate, request the parties claiming the benefit of exemption, to demonstrate that the conditions of the exemption are satisfied, and/or to produce a copy of the agreement for inspection. The Commission is likely to make such request if there are concerns of appreciable anti-competitive effects. The Commission may proceed to cancel the exemption, if necessary.

### **Cancellation Procedure**

46. If the Commission proposes to make a decision to cancel an exemption in respect of a liner shipping agreement, it must give the persons whom the Commission considers are or were a party to the agreement, a written notice

setting out the facts on which the Commission relies and its reasons. Such persons will be given an opportunity to make written representations to the Commission and to request in their written representations for an opportunity to make oral representations to clarify.

47. The Commission's decision to cancel will set out the facts on which the decision is based and the reasons. The decision will be published on a register on the Commission's website.

### **Appeals**

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

## MODE OF CONSULTATION

49. The Commission seeks feedback on the design and impact of the proposed BEO. The Commission will review the submissions and make changes, where appropriate.

50. Written submissions are to be sent to the Commission through email and either by post/courier or by fax:

Email: CCS\_Draftguidelines@ccs.gov.sg

AND

Post/Courier: Competition Commission of Singapore  
5 Maxwell Road  
#13-01, Tower Block  
MND Complex  
Singapore 069110  
Attn: Director, Economics

Fax: (65) 62246929

51. Parties that submit comments should organise their submissions as follows:

- i. Cover page;
- ii. Table of contents;
- iii. Summary of major points;
- iv. Statement of interest;
- v. Comments; and
- vi. Conclusion.

52. Supporting material may be placed in an annex. All submissions should be clearly and concisely written, and should provide a reasoned explanation for any proposed revision to the proposed BEO. Where feasible, parties should identify the specific paragraph of the proposed BEO or the consultation paper on which they are commenting. In any case in which a party chooses to suggest revisions to the text of the proposed BEO, the party should state clearly the specific changes to the text that they are proposing.

53. All submissions should be made at or before noon, **27 April 2006**. Submissions must be submitted in both hard and soft copies (in Microsoft Word format). Parties submitting comments should include their personal/company

particulars as well as their correspondence address, contact numbers and email addresses on the cover page of their submissions.

54. The Commission reserves the right to make public all or parts of any written submission and to disclose the identity of the source. Commenting parties may request that any part of the submission that the commenting party believes to be proprietary, confidential or commercially sensitive be kept confidential. Any such information should be clearly marked and placed in a separate annex. Where the Commission agrees with the request, it will consider the information but will not publicly disclose it. If the Commission rejects the request, it will not consider the information and will return the information to the submitting party. As far as possible, parties should limit any request for confidential treatment of information submitted. The Commission will not accept any submission that requests confidential treatment of all, or a substantial part, of the submission.

55. The Commission will also conduct a technical briefing on **12 April 2006** for the maritime industry and relevant stakeholders. Parties interested in attending the briefing can download the registration form from the CCS website and submit the completed form to the Commission (attention to Ms Susan Tan) via:

Fax: (65) 62246929 or  
Email: [ccs\\_feedback@ccs.gov.sg](mailto:ccs_feedback@ccs.gov.sg)

on or before the closing date on 11 April 2006 (noon).