

**CONSULTATION ON CCS'S PROPOSED
RECOMMENDATION TO THE MINISTER WITH
RESPECT TO LINER SHIPPING AGREEMENTS**



May 2015

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Scope of this consultation

1. This consultation concerns the Competition (Block Exemption for Liner Shipping Agreements) Order (“the BEO”) made by the Minister for Trade and Industry (“the Minister”) under section 36 of the Competition Act (Cap.50B)(“the Act”). The BEO exempts a category of liner shipping agreements from section 34 of the Act which prohibits agreements, decisions and concerted practices that have the object or effect of preventing, restricting or distorting competition in Singapore.
2. The BEO was issued in July 2006, extended in 2010, and will expire on 31 December 2015. The Competition Commission of Singapore (“CCS”) has been reviewing the merit of a continued block exemption for liner shipping agreements in Singapore and is proposing to recommend to the Minister that the block exemption for liner shipping agreements (“the block exemption”) be extended for another five years till 31 December 2020 in its current form.
3. This consultation encompasses the proposed recommendation that CCS intends to make with regard to the block exemption, and the possible impact of the proposal on the Singapore economy, in particular the impact on players in the maritime industry such as shippers, port operators, liners, and logistics service providers.

Mode of consultation

4. CCS is seeking feedback on the proposals set out in this document. The section containing the questions for consultation may be useful as you organise your submission. Please respond to as many questions as you think fit, and provide any supporting evidence, if any, for the views expressed. Where possible, please identify specific paragraphs of the consultation paper on which you are commenting.
5. All submissions must reach CCS at or before **noon**, on **15 June 2015**. Submissions must be made in both documentary and electronic form. You must state whether you are responding in your private capacity or whether you represent the views of an organisation. For submissions made on behalf of an organisation, a description of the organisation and whom it represents (where applicable) should be included. All submissions should include personal/company particulars, as well as the correspondence address, contact numbers and email addresses.
6. CCS reserves the right to make public all or parts of any written submission and to disclose the identity of the source. You may request that any part of the submission believed to be confidential or commercially sensitive be kept confidential. Any such information should be clearly marked and placed in a separate annex. Where CCS agrees with the request, it will consider the

information but will not publicly disclose it. If CCS rejects the request, it will not consider the information and will return the submission. As far as possible, you should limit any request for confidential treatment of information submitted. CCS will not accept any submission that requests confidential treatment of all, or a substantial part, of the submission.

7. CCS will review submissions received within time and may modify its recommendation to the Minister, where appropriate. After the consultation, CCS will publish a summary of responses received and make public its final recommendation to the Minister.

8. If you have any queries regarding the content of this consultation, please contact:

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9. Should you wish to request a meeting with CCS officers on the matter, please contact Mr. Tan Hi Lin or Ms. Nimisha Tailor (details as set out in paragraph 8 above).

Introduction and background to the BEO

10. Section 36 of the Act empowers the Minister to make an order, following the recommendation of CCS, to exempt certain categories of agreements from the section 34 prohibition¹. This is known as a block exemption, which is granted on the basis that a category of agreements fulfil the criteria set out under section 41 of the Act i.e. the agreements contribute to improving production or distribution, or promoting technical or economic progress, without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of such objectives, or afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.
11. On 14 July 2006, following a study of the maritime industry and a public consultation, CCS made its recommendation for a block exemption for liner shipping agreements to the Minister, who issued the BEO exempting a category of liner shipping agreements from the section 34 prohibition.
12. The objectives of CCS in recommending the BEO in 2006 were to ensure that within an overall regulatory environment that promotes and sustains competition in Singapore:
 - a. Agreements which promote the rationalisation of liner shipping operations by means of technical, operational and commercial agreements 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.
13. The BEO was recognised as important in maintaining Singapore's position as a premier international maritime centre, which was consistent with the promotion of economic progress as provided for in section 41 of the Act. Conditions were also included in the BEO to facilitate competition between parties to a liner shipping agreement, and to limit the extent of anti-competitive behaviour that liner operators could engage in through the liner shipping agreement. This was to ensure that liner shipping agreements did not impose restrictions which were not indispensable to the attainment of the above objectives of the BEO, and that competition was not eliminated substantially.
14. The BEO took effect retrospectively from 1 January 2006 for a period of five years.
15. Prior to the expiry of the Competition (Block Exemption for Liner Shipping Agreements) Order 2006 on 31 December 2010, a review was undertaken by

¹ Section 34 of the Act prohibits agreements, decisions and concerted practices that have the object or effect of preventing, restricting or distorting competition in Singapore.

CCS that included a public consultation exercise. In recommending to the Minister that the BEO be extended for another five years, CCS assessed that the BEO continued to fulfil the criteria under section 41 of the Act, and the rationale for the BEO in 2006 remains relevant for the following reasons:

- a. As a small and open economy, the presence of an extensive network of liner shipping companies has played a large part in contributing to Singapore's status as a premier international maritime centre for liner shipping operations;
- b. CCS recognises that the presence of a large number of major shipping companies has important flow-through benefits for local shippers and the Singapore economy;
- c. A block exemption will provide continued certainty to the shipping industry; and
- d. Antitrust exemptions for liner shipping are still the regulatory norm.

16. On 16 December 2010, the Minister announced that the BEO would be extended for five years, until 31 December 2015.

Proposal with respect to the block exemption

17. CCS has been reviewing the block exemption for liner shipping agreements. The proposed recommendation takes into consideration the findings of the CCS-commissioned consultancy study, which was based on both quantitative and qualitative information provided by industry stakeholders,² as well as feedback from CCS's own consultation with key industry stakeholders³. CCS has also been monitoring developments in the industry as well as regulatory developments overseas. CCS has considered all views carefully before arriving at the following proposals for public consultation.

(i) CCS proposes to recommend that the Minister extends the block exemption for a further five years (to 31 December 2020).

Connectivity of Singapore's container port

18. Antitrust exemptions for liner shipping agreements generally remain the regulatory norm worldwide. Given the size of the domestic economy, Singapore is not a major port of origin or destination unlike other major ports and a very large proportion of Singapore's container cargo throughput involves transshipment and Singapore's container port is the world's largest transshipment hub. The connectivity and concentration of liner shipping services available in Singapore generates considerable benefits, both directly and indirectly to

² As part of the consultancy study, CCS sent information requests to 49 liners (including ocean carriers and regional feeders), 15 freight forwarders/non-vessel operating carriers, 23 large and small shippers, the two port operators, and MPA in April 2014. CCS received 33 written submissions and the consultants conducted nine interviews.

³ CCS sought and obtained feedback from Singapore Shipping Association, Singapore National Shippers' Council, Singapore Logistics Association, Maritime and Port Authority of Singapore, PSA, Economic Development Board, International Enterprise Singapore, and SPRING Singapore in January and February 2015.

Singapore, including providing a higher degree of connectivity and service choice for Singapore's importers and exporters, beyond what might ordinarily be expected if the port had simply developed as a gateway facility.

Cost savings from economies of scale

19. Operational agreements, by facilitating the sharing of vessels among liners, increase the utilisation of space on vessels. Through such coordination, more frequent services can be provided and cost savings can be achieved by the liners. Operational agreements may also enhance competition between liners when they enable a group of smaller liners to provide services that compete with larger liners or other alliances. There is broad international consensus on the economic benefits of operational agreements.

Significance of economic benefits to Singapore

20. In consideration of the above, liner shipping agreements contribute to improving the production of liner shipping services and the distribution of goods in Singapore. In particular, they enable the connectivity of Singapore's container port with consequent broader benefits to the Singapore economy, and facilitate cost savings for the liners from resultant economies of scale.
21. Even if rate-making agreements may result in higher prices for liner shipping services, it is unlikely that there would be any significant volume increase due to rate reduction. Hence, the economic benefits resulting from liner shipping agreements are likely to be significant enough to outweigh the anti-competitive effects of liner shipping agreements.

The existing BEO imposes conditions that limit the extent of restrictions on competition

22. The conditions for exemption under the BEO require that liner shipping agreements allow members to have individual confidential service arrangements and to withdraw from the agreement without penalty. In addition, the agreements cannot impose obligations on members to adhere to the agreed/recommended prices or disclose confidential information on service arrangements. By encouraging individual private contracting, these BEO conditions ensure that restrictions under the agreements are maintained at the narrowest necessary for attainment of the economic benefits.
23. Considering the above, liner shipping agreements allowed under the BEO do not impose restrictions that are not indispensable to the attainment of economic benefits for Singapore.

Liner shipping agreements do not eliminate competition in respect of a substantial part of the goods and services in question

24. As noted above, for a liner shipping agreement to be exempted under the BEO, it has to comply with conditions that facilitate individual private contracting. Based on the information that CCS has obtained, individual private contracting is a common practice in the industry, and freight rates are generally subject to bilateral negotiations between liners and shippers or freight forwarders. In addition, local shippers enjoy the benefits of competition due to the continued presence of a large number of liners and the associated connectivity of trade routes.
25. In this regard, the BEO is unlikely to confer considerable market power on any liner(s), or eliminate competition in a substantial part of the liner shipping industry.

Liner shipping agreements satisfy the criteria for block exemption

26. Given that all the necessary conditions set out under the section 41 criteria for a block exemption are satisfied, CCS proposes to recommend that Minister extends the BEO for another five years until 31 December 2020.

(ii) CCS proposes to retain the current features and scope of the BEO.

27. In extending the block exemption, CCS is proposing to retain the current features and scope of the BEO.
28. Details in relation to the proposed block exemption for liner shipping agreements are set out in Annex 1: Features of the Proposed Competition (Block Exemption for Liner Shipping Agreements) Order.
29. CCS will continue to keep a close watch on developments in the shipping industry and international regulatory development.
30. Where appropriate, CCS may also recommend to the Minister to vary or revoke a block exemption, as provided for under section 40 of the Act. Any significant changes to the provisions in the block exemption will be subject to careful evaluation and to a public consultation process.

Questions for Consultation

31. The following questions highlight the key issues for which CCS is seeking feedback. Parties submitting comments may find it useful to organise their submissions according to the issues highlighted below.

- Q1 What are your views on the proposal to extend the block exemption, in its current form, for another five years?
- Q2 What are your views on the impact of the proposed block exemption on your business — would you say it has a positive, negative, or neutral impact? Why?
- Q3 Do you have any other comments on the proposals on the block exemption?

ANNEX 1 – FEATURES OF THE PROPOSED COMPETITION (BLOCK EXEMPTION FOR LINER SHIPPING AGREEMENTS) ORDER⁴

Application of the proposed block exemption order (“the proposed Order”)

1. A liner shipping agreement that meets the requirements of the proposed Order will be exempt from the section 34 prohibition. The proposed Order will, in effect, allow parties to liner shipping agreements to discuss and agree on the rationalisation and management of capacity and prices, subject to certain conditions and obligations.
2. A more detailed explanation on the conditions and obligations to be satisfied in order for a liner shipping agreement to qualify for exemption under the proposed Order is found in the sub-section on exempted agreements below.
3. Practices by liner operators that amount to an abuse of a dominant position are not exempt and will be considered by CCS under section 47 of the Act.

General Approach and Structure of the proposed Order

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

Commencement and Duration

5. The proposed Order will take effect from 31 December 2015 and will continue for five years, up to 31 December 2020 (dates inclusive).

Definitions

Liner operator

6. A liner operator is defined as an undertaking which (a) provides liner shipping services and (b) is a party to a liner shipping agreement.

Liner shipping services

7. Liner shipping services are defined as the transport of goods on a regular basis on any particular route between ports and in accordance with timetables and sailing dates advertised in advance and made available, even on an occasional basis, by a liner operator to any transport user against payment. Such services include inland carriage of goods occurring as part of through transport.

Liner shipping agreement

8. A liner shipping agreement is defined as an agreement between two or more vessel-operating carriers which provide liner shipping services pursuant to

⁴ Annex 1 is intended to describe key features of the proposed block exemption for liner shipping agreements and is not intended as a legal document.

which the parties agree to co-operate in the provision of liner shipping services in respect of one or more of the following: (i) technical, operational or commercial agreements; (ii) price; (iii) remuneration terms.

Market

9. The market is defined as any market for liner shipping services in which the parties to a liner shipping agreement operate under the agreement.

Price

10. The price is defined as the price for which a liner operator performs or offers to perform liner shipping services; and includes any charge, other than the base freight rate, that is incidental to or reasonably connected with the provision of liner shipping services, whether arising by reason of the provision of the liner shipping services or by reason of the occurrence of an uncertainty.

Remuneration Term

11. Remuneration term is defined as any term affecting payment of the amount of the price in relation to the provision of liner shipping services (including a reduction thereof).

Service Arrangement

12. A service arrangement is defined as an agreement concluded between one or more transport users and a liner operator under which, in return for an undertaking from the transport user to commission the transportation of a certain quantity of goods over a given period of time, a transport user receives an individual undertaking from the liner operator to provide an individualised service of a given quality, specially tailored to the needs of the transport user.

Tariff

13. A tariff refers to a list of prices and remuneration terms for which, pursuant to a liner shipping agreement, liner operators agree they may offer liner shipping services to transport users. A tariff does not include prices and remuneration terms under a service arrangement.

Through transport

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

Transport user

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

Exempted Agreements

Application to liner shipping agreements in general

16. To qualify for exemption, a liner shipping agreement, regardless of the aggregate market share of the parties to the agreement, must adhere to the following conditions. The agreement must allow the parties to the agreement:
- (i) to offer, on the basis of individual confidential contracting, their own service arrangements;
 - (ii) to withdraw from the agreement on giving any agreed period of notice without financial or other penalty such as, in particular, an obligation to cease providing liner shipping services in a market, whether or not coupled with the condition that such activity may be resumed only after a certain period has elapsed; and
 - (iii) the agreement does not require liner operators to mandatorily adhere to a tariff and disclose, whether to other liner operators or otherwise, confidential information concerning service arrangements.
17. These conditions have been retained in the proposed Order to facilitate competition between parties to a liner shipping agreement, and limit the extent of anti-competitive behaviour that liner operators can engage in through the liner shipping agreement.

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

18. Where the aggregate market share of the parties to a liner shipping agreement exceeds the market share limit, the parties are required to comply with the following obligations if they wish to enjoy the benefit of the exemption. These are:
- (i) filing their liner shipping agreement and any variation or amendment thereto with CCS in such mode and manner and within such period of time as CCS may specify;
 - (ii) where any variation or amendment is made to the agreement from time to time to the filing of the documents referred to in paragraph 18(i) are filed, filing such variation or amendment, the liner shipping agreement and all preceding variations or amendments thereto in such mode and manner and within such period of time as CCS may specify;
 - (iii) making available to CCS upon request documents and details relating to any tariff, the structure and service level, and other aspects of the liner shipping services under the agreement relevant to the market in such mode and manner and within such period of time as CCS may specify;
 - (iv) notifying CCS of the details of any variation or amendment to the documents and details in paragraph 18(iii) made from time to time in

such mode and manner and within such period of time as CCS may specify;

- (v) making available to transport users and within such period of time as CCS may specify information concerning any tariff and the structure and service level of the liner shipping services under the agreement relevant to the market as CCS may specify, by allowing for examination of such documents at the offices in Singapore of the parties or their agents, or at a publicly available internet website; and in any event, upon request at a reasonable cost in paper or electronic form; and
 - (vi) notifying transport users of the details of any variation or amendment to the information in paragraph 18(v) made from time to time in such mode and manner and within such period of time as CCS may specify.
19. These obligations have been retained to ensure that transport users and CCS are kept aware of those liner shipping agreements where the aggregate market share of the parties exceed the market share limit.
20. There is no requirement to file a liner shipping agreement with CCS or notify the particulars of the liner shipping services under the agreement where the aggregate market share of the parties does not exceed the market share limit. CCS is of the view that such agreements, provided they fulfil the conditions set out in paragraph 18(i) to (vi) above, pose minimal risks of appreciable adverse effect on competition.

Market definition and exceeding the market share limit

21. The parties to a liner shipping agreement do not exceed the market share limit if they hold, in a market, an aggregate market share of not more than 50 per cent calculated by reference to:
- (i) the volume of goods carried; or
 - (ii) the aggregate cargo carrying capacity of the vessels operating in the market measured by freight tonnes or 20-foot equivalent units.
22. As long as the aggregate market share of the parties to the liner agreement does not exceed the market share limit on either one of the two methods of measurement, the agreement will be considered to be below the market share limit.
23. Parties to a liner shipping agreement shall be deemed not to exceed the market share limit if they hold, in a market, an aggregate market share of not more than 55% for a period of not more than two consecutive calendar years. This provision recognises that short term fluctuations in the aggregate market share of parties to the liner shipping agreement are unlikely to have a significant long term impact on the market.
24. The definition of the market is deliberately broad because the concept of a market for competition analysis differs from the standard commercial

understanding of the market. The proposed Order will not specify how a market will be defined, i.e. the extent or geographic coverage of the market, as guidance has been provided by CCS on market definition (please refer to the *CCS Guidelines on Market Definition*). However, consistent with its general approach on defining markets in a competition analysis, CCS will consider generally accepted competition law principles and case law when defining markets on a case-by-case basis. To provide some practical guidance, the definition of markets may include the following geographic definitions:

- (i) With respect to long-distance oceanic trades, the market may be defined as ‘trade’ between broadly defined geographical regions, for example, North Europe and East Asia.
 - (ii) With respect to regional and feeder trades, the market may be defined as the provision of country-to-country shipping services (for example Singapore/Indonesia or Singapore/Thailand).
25. 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’.
26. When dealing with new services, the use of these or similar definitions would greatly reduce the possibility that parties to a liner shipping agreement covering a new service linking a relatively minor port in a partner country to Singapore would breach the market share limit. CCS is of the view that there will generally be minimal competition concerns regarding service on new or thinly serviced routes unless there is concrete evidence of anti-competitive effects that are likely to be more than transitory.
27. It will be for the parties to assess, or to seek legal/expert advice on whether their aggregate market share exceeds the market share limit, and whether the agreement satisfies the conditions and obligations for exemption under the proposed Order.

Coverage is not restricted to the carriage of cargo by container

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

Cancellation of the Exemption

29. The proposed Order provides for the cancellation of the block exemption in respect of a liner shipping agreement. This is in line with the provisions of section 37(2) of the Act.

30. Where there has been a breach of any condition specified in the proposed Order, this shall have the effect of cancelling the exemption in respect of that agreement, from such date as CCS may specify.
31. Where there has been a failure to comply with any obligation specified in the proposed Order or where CCS finds in a particular case that the agreement has effects which are incompatible with the provisions of section 41 of the Act, CCS may cancel the exemption from such date as CCS may specify.
32. 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. Individual voluntary disclosure of confidential information on service arrangements is allowed under the proposed Order, as this is not considered likely to have an appreciable anti-competitive effect. However, concerted behaviour including tacit behaviour that effectively amounts to disclosure of confidential information on service arrangements could substantially reduce the scope of independent contracting and pricing behaviour. This would be contrary to the intention of the condition for exemption, that the liner shipping agreement must not require disclosure of confidential information concerning service arrangements.
33. Whether or not the parties to a liner shipping agreement exceeds the market share limit, the parties claiming the benefit of the exemption, shall, upon notice being given by CCS and within such period of time as may be specified by CCS, demonstrate that the provisions of the proposed Order are satisfied.

Cancellation Procedure

34. If CCS proposes to make a decision for or in relation to the cancellation of the block exemption in respect of a liner shipping agreement (“Cancellation Decision”), CCS shall give notice of this to each person whom CCS considers is or was a party to the agreement. The notice shall contain information referred to in regulation 15(1) of the Competition Regulations 2007. Opportunities for representations and requests for access to file will also be carried out in accordance with regulation 15 of the Competition Regulations 2007.
35. When CCS has made a decision for or in relation to the cancellation of the block exemption in respect of a liner shipping agreement, it shall give notice of the decision to each person whom CCS considers is or was a party to the agreement and such notice will set out the facts on which CCS bases the decision and CCS’s reasons for making the decision. This cancellation decision will also be published.

Appeals

36. A cancellation decision may be appealed to the Competition Appeal Board. Such an appeal must be brought within the specified time period set out in regulation 7(3) of the Competition (Appeals) Regulations.