



Proposed Block Exemption Under Section 8(1) of the Competition Act 2010 [Act 712]

Proposed Block Exemption for Vessel Sharing Agreements and Voluntary Discussion Agreements in Respect of Liner Shipping Services

11 May 2017

[No. MyCC/700/4/2/3(2)]

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1. INTRODUCTION

1. The Competition (Block Exemption for Vessel Sharing Agreements and Voluntary Discussion Agreements in respect of Liner Shipping Services) Order 2014 (BEO) was published in the gazette by virtue of P.U.(A) 195/2014 on 4 July 2014 and took effect on 7 July 2014.
2. The BEO was granted by the Malaysia Competition Commission (the Commission) under section 8(1) of the Competition Act 2010 [Act 712] (the Act). Section 8 reads as follows:

Block exemption

8. (1) If agreements which fall within a particular category of agreements are, in the opinion of the Commission, likely to be agreements to which section 5 applies, the Commission may, by order published in the Gazette, grant an exemption to the particular category of agreements.

(2) An exemption granted under this section is referred to as a “block exemption”.

(3) An agreement which falls within a category specified in a block exemption is exempt from the prohibition under section 4.

(4) The Commission in granting the block exemption may impose any condition or obligation subject to which a block exemption shall have effect.

(5) A block exemption may provide that—

- (a) if there is a breach of a condition imposed by the block exemption, the Commission may, by notice in writing, cancel the block exemption in respect of the agreement from the date of the breach;
- (b) if there is a failure to comply with an obligation imposed by the block exemption, the Commission may, by notice

in writing, cancel the block exemption in respect of the agreement;

- (c) if the Commission considers that a particular agreement is not one to which section 5 applies, the Commission may, by notice in writing, cancel the block exemption in respect of the agreement from such date as the Commission may specify;
 - (d) the block exemption shall cease to have effect at the end of a period specified in the order; or
 - (e) the block exemption is to have effect from a date earlier than that on which the order is made.
3. The grant of the BEO was made pursuant to an application filed by the Malaysia Shipowners Association (MASA), the Shipping Association of Malaysia (SAM) and the Federation of Malaysia Port Operators Council (FMPOC) (the Applicants) on 16 December 2011. The Applicants sought a 5-year block exemption to be granted by the Commission for liner shipping agreements in respect of the Vessel Sharing Agreements (VSA) and Voluntary Discussion Agreements (VDA) entered into by liner shippers in respect of the entire transport chain including intra-modal transport services.
4. Upon receiving the application, the Commission conducted its assessment on whether both the VSA and VDA satisfy all the requirements provided under section 5 of the Act. The onus lies on the Applicants to prove to the Commission that the requirements have been satisfied. Section 5 provides as follows:

Relief of liability

5. Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons:

- (a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- (b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
- (c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- (d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

5. Very briefly, the Applicants submitted that the liner shipping operators enter into liner shipping agreements as it was essential in promoting essential liner services and preserving competitive choices for the importers and exporters. The Applicants argued that these agreements have been accepted internationally for more than a century and block exemptions have been granted by a great majority of Malaysia's trading partners around the world by their respective competition authorities including Singapore, Japan, Australia, United States and Canada.

6. Taking into consideration the limited resources that the Commission had, in particular the expertise in the shipping industry, the Commission had engaged the Malaysia Institute of Transport (MITRANS) to assist in the assessment of the Application.

7. MITRANS had submitted a report based on its study conducted on the Malaysian shipping industry outlining its grounds on whether there are justifications for a block exemption to be granted to the Applicants.
8. Very briefly, MITRANS proposed that a block exemption be granted to the Applicants based on the following grounds:

- (i) A need for regularity in meeting shippers' demand at ports

Liner shipping companies provide scheduled services for the transport of cargoes over a specified geographic range of ports within an established time schedule including pre-determined regularity and frequencies. A consequence of providing such schedules was the need to balance supply and demand at ports served by these scheduled services.

- (ii) Latent market demand for multiple small shipments

There is a latent demand for such regularity and frequency of services by small shippers who would not be in a position to charter a whole ship for their small cargo lots. This is where scheduled services are different from the bulk services that operate on charters such as time or voyage charters, carrying whole ship load of usually one cargo such as oil, grain, iron ore, and chemicals.

(iii) High fixed costs

A recognized aspect of the need to put in place a scheduled service is the high fixed cost nature of operations that carriers would face in the form of certain costs that include voyage and operating costs. In this regard, voyage costs include port and canal costs which will become fixed when a particular schedule is advertised in advance.

(iv) Numerous operational costs, finance costs and chartering costs

There are operating costs such as fuel, crew costs, supplies and stores as well as related costs that should be provided for the ship in its services. It is also in most cases necessary to take into account the administration and other costs that are incurred such as capital and interest repayments charges in cases where the ships are not completely amortized. There could be charter rates since not all ships in these services are owned by the liner service providers and in fact it is known in the industry that at least 50% of ships in service are leased by container ship operators.

(v) Unbalanced demand on various trade routes

The unbalanced demand in the different directions of the trade route and the consequent costs that this entails pose strong pressures on liner shipping companies providing scheduled services. These pressures have turned shipping companies to form conference¹ agreements under which they are in close price and scheduling cooperation with other shipping lines that are also providing substantially similar services to the same range of ports.

(vi) Dependency on growth of specialized ports to handle containers carried by liner ships

The evolution of major container ports and their location and distribution also reflect the effect of globalization on the world economy and the growth of world trade. To cope with the specialized nature of containerized cargo, ports have emerged in different parts of the world in line with economic growth. These ports provide important infrastructure for the transfer and distribution of container goods flowing in the international supply chain.

¹ Shipping conferences refer to shipping companies that have formed an agreement or arrangement to agree on and set freight rates over different shipping routes. There are different shipping conferences for different regions of the world. Shipping conferences, aside from setting rates, adopt a wide number of policies such as allocation of customers, loyalty contracts, open pricing contracts, etc. (OECD Glossary of Statistical Terms available at [www.http://stats.oecd.org/glossary/detail.asp?ID=3311](http://stats.oecd.org/glossary/detail.asp?ID=3311))

(vii) East Asia and Oceania trade is largely unregulated

Countries in the Oceania region like Australia and New Zealand have block exemptions in place for the liner shipping industry. Similar exemptions are found in East Asian countries such as Japan and Korea. Although China officially has anti-trust laws in place, in practice these laws are not enforced against liner companies operating there. Most of the larger liner fleets are Chinese owned and a strict application of competition rules in practice will jeopardize the industry. The block exemption is required for liner shipping in Malaysia so that the competition law regime here reflects the practice of other countries in this region. For ships trading from Malaysia with the US and UK, the principle of reciprocity applies and there has to be compliance with the stricter standards there, regardless of whether a block exemption is given for liner shipping.

(viii) Dense service volume in trade with Asia compared with other jurisdictions

Malaysia's largest trading partners, other than the US are the various countries in Asia. There are dense service volumes not only to regional ports such as Singapore, but also East Asian ports in China. Most of the cargo that goes to the US apparently goes through Singapore. There is little cargo moving directly from

Malaysia to the US. Further, trade with EU accounts roughly for about 10 percent of the containers cargo.

(ix) Malaysia ranked in the top 7 of UNCTAD's maritime connectivity index

It is evident that the external trade of Malaysia has an important containerized shipping component that is, in terms of ports, ships as well as connections with global markets. The services are provided by the larger shipping companies in the world and they are providing important shipping network connections to major markets for the output of the economy of the nation. These services have been ongoing for several decades and would have been in parallel with the pace of containerization of the external trade of the country. Further, there have been massive investments in container port infrastructure in various parts of the country in order to provide a more efficient network of services to various trading regions of the world.

9. Based on MITRANS study, the Commission had discussions with the Ministry of International Trade and Industry (MITI), the Ministry of Transport (MOT), the Ministry of Finance (MOF) as well as the Economic Planning Unit (EPU) to get their views and feedback on whether it is justified for a block exemption to be granted to the Applicants.

10. In principle, all these government agencies agreed for a block exemption to be granted due to the nature and structure of the shipping industry. Nevertheless, it was also agreed that such an exemption shall only be granted subject to terms and conditions to be imposed by the Commission.

11. In accordance with section 9 of the Act, the Commission issued a Proposed Block Exemption for both the VSA and VDA. A series of public consultations were held in Kuala Lumpur, Penang, Kota Kinabalu, Kuching and Johor Bahru which were aimed at obtaining feedback from the stakeholders including the freight forwarders, hauliers and manufacturers.

12. Stakeholders who had provided written responses on the block exemption application include the following:
 - (i) DIC Compounds (Malaysia) Sdn. Bhd.;
 - (ii) Malaysia Steel and Metal Distributors' Association;
 - (iii) Malaysia Hardware, Machinery & Building Material Dealers' Association;
 - (iv) Federation of Malaysia Manufacturers;
 - (v) Malaysian International Chambers of Commerce and Industry; and
 - (vi) Federation of Sabah Manufacturers (submitted jointly by):
 - Sabah United Chinese Chamber of Commerce & Industry;
 - Kota Kinabalu Chinese Chamber of Commerce & Industry;

- Sabah Timber Industry Association;
- Sabah Furniture Association;
- Sabah Housing and Real Estate Developers Association;
- Malaysian International Chamber of Commerce & Industry, Sabah;
- Malaysian Plastic Manufacturers Association, Sabah;
- Federation of Malaysian Manufacturers Sabah Representative Office;
- Kadazandusun Chamber of Commerce & Industry;
- Kota Kinabalu Forwarding Agents Association;
- Persatuan Pengusaha Lori Kontena Kota Kinabalu;
- Sabah West Coast Lorry Transportation Association;
- Malaysian Association of Tour and Travel Agents;
- Kota Kinabalu Hardware Machinery & Building Material Traders Association, Sabah;
- The Institution of Engineers, Sabah Branch;
- Association of Consulting Engineers Malaysia – Sabah Branch;
- Consumer Affairs & Protection Society of Sabah;
- Sabah Bakery Association;
- Sabah Confectionery & Bakery Association;
- Sandakan Coffee Association; and
- KKIP Investors Council.

13. After taking into consideration all the feedback and findings, the Commission agreed to grant a three year block exemption

for the VSA and VDA from the date of the Block Exemption Order published in the Gazette, with additional conditions imposed. An Explanatory Note was also issued to explain particularly to the general public the workings of the Block Exemption Order. The Commission had also undertaken to review the Block Exemption Order two years after the date of the commencement of the same.

14. The first condition imposed by the Commission is that it does not cover the whole of the intra-modal transport services (including the land carriage of goods and warehousing services). This basically means that the Block Exemption Order shall only apply to transport services provided by the liner operators in respect of ocean transport and shall not include inland carriage of goods occurring as part of through transport including services by logistic providers, forwarders, depot operators, truckers, railroads, off-dock consolidation facility service providers, and off-dock storage and warehousing service providers, whether or not such entities are affiliated with the liner operators.
15. The second condition imposed by the Commission is that no element of pricing or tariff in any form is allowed in respect of these services. In other words, although a block exemption was granted to the VSA and VDA, such agreements must not have any clauses which relates to price fixing or tariff. Any party who enter into the VDA shall not be imposed a penalty or financial loss if they depart from the said VDA.

16. The duration of the Block Exemption Order granted was three years and it is due to expire on 6 July 2017.

2. THE APPLICATION FOR RENEWAL

17. On 6 March 2017, MASA and SAM (the New Applicants) filed an application for the renewal of Block Exemption for VSA and VDA in respect of liner shipping services.

18. The application also seeks for the scope of the BEO to be extended to allow the liner operators who are parties to the VDA to discuss and agree on voluntary and non-binding recommendations relating to rates, charges and other commercial terms.

3. LINER SHIPPING SERVICES

19. Liner shipping services is defined as the containerized and other scheduled transport of goods by ocean carriers 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 such operators to any transport user against payment.

20. In this regard, full vessel chartering arrangements with customers, such as tanker and bulk vessel operations are excluded from the BEO and similarly must be excluded from this renewal application.

21. The BEO only included services provided by liner operators in respect of ocean transport and did not include any inland carriage of goods occurring as part of through transport such as services provided by logistics providers, forwarders, depot operators, truckers, railroaders, off-dock consolidation facility service providers, and off-dock storage and warehousing service providers. Such services of inland carriage of goods are therefore subjected to the application of the Act. Similar conditions must be apply to this application.

3.1 TRADE ROUTES AND TRANSSHIPMENTS OF CONTAINERIZED CARGO IN MALAYSIA

22. According to the UNCTAD Review of Maritime Transport 2016, the world's seaborne trade volumes are estimated to be over 80% of the world's merchandise trade. International container shipping industry is a major component of the international maritime transport engaged in the carriage of seaborne trade.
23. Based on the study that was conducted by MITRANS, the containerized liner shipping services are operated over a number of trade routes linking different geographic regions in the world. These include the major east-west arterial routes, the north-south routes and other linked cross routes. The principal routes that have evolved over the past two decades along the east-west sector are usually referred as the arterial

routes and include the Far East-Europe, Trans-Pacific and Trans-Atlantic.

24. The nature of economic activities created the flow of manufactured goods from supplier to consumer countries and regions. For instance, the principal trade routes link areas of economic activities such as the manufacturing regions in the Far East including China, Taiwan, Japan and South East Asia to the consuming regions in the Middle East and Europe.
25. Malaysia's top ten trading partners² in 2015 including China commanded RM230,817 million or 15.8% of Malaysia's total trade that was worth RM 1.46 billion, followed by Singapore (13.0%), United States (8.8%), Japan (8.6%), Thailand (5.9%), Taiwan (4.1%), Indonesia (4.1%), Hong Kong SAR (3.8%), India (3.2%) and Germany (2.9%).
26. Malaysia was ranked 12th out the top 20 exporters of containerized cargo in 2014 with a total container throughput of 2.6 million Twenty-Foot Equivalent Unit (TEU). China was the leader with a total container throughput of 36.0 million TEU followed by the United States (11.9 million TEU) and South Korea (5.93 million TEU)³. On the other hand, Malaysia was ranked 13th out of top 20 importers of containerized cargo in 2014 with the record of 2.33 million TEU container throughput. The United States topped the chart with 19.6 million TEU of

² Economic Report 2016/2017 from the Ministry of Finance of Malaysia

³ Trade Statistics from the World Shipping Council, available at <http://www.worldshipping.org/about-the-industry/global-trade/trade-statistics#1>

container throughput followed by China (14.7 million TEU) and Japan (6.55 million TEU)⁴.

27. Malaysia is geographically blessed due to its location at a crossroads of trade between the East and West. The Strait of Malacca is one of the most economically and politically important shipping lanes in the world. Port Klang was ranked 12th out of the world's top 50 container ports in both 2014 and 2015 with the total container throughput of 10.95 million TEU and 11.89 million TEU respectively. On the other hand, the Port of Tanjung Pelepas (PTP) was ranked 18th out of the world's top 50 container ports in 2014 and its position had improved to 17th in 2015 with the total container throughput of 8.5 million TEU and 9.1 million TEU respectively⁵.

28. Both Port Klang and PTP are popular destinations for transshipment of containerized cargo as the total container throughput for transshipment was very high compared to the volume of direct import and export in the respective ports. In 2014, the total container throughput for transshipment in both ports was 98.2% out of the total container throughput for transshipment in Malaysia and the figure had increased in 2015 to 98.7% which is equivalent to 16,255,794 TEU out of the total container throughput for transshipment (16,463,899 TEU) in Malaysia⁶.

⁴ Trade Statistics from the World Shipping Council, available at <http://www.worldshipping.org/about-the-industry/global-trade/trade-statistics#2>

⁵ Top 50 World Container Ports from the World Shipping Council, available at <http://www.worldshipping.org/about-the-industry/global-trade/top-50-world-container-ports>

⁶ Transport Statistics Malaysia 2015, Ministry of Transport Malaysia page no. 67-69

29. The volume of transshipment trade in Malaysia had been consistently higher than the volume of both direct export and import. This indicates that being in the transshipment market, the nation's major source of business is from other countries.

4. LINER SHIPPING AGREEMENTS

30. Similar to the BEO, the liner shipping agreements strictly refer to the VSA and VDA.

4.1 VESSEL SHARING AGREEMENTS

31. The VSA are agreements between liner operators in which the parties to such agreements shall only discuss and agree on the operational arrangements relating to the provision of liner shipping services, including the coordination or joint operation of vessel services, and the exchange or charter of vessel space. The VSA shall not contain any element of price fixing, price recommendation or tariff imposition, by any person on transport users.
32. The VSA shall not require the disclosure of any confidential information concerning the liner shipping service arrangements to any transport user by any liner operator. In addition, the VSA shall allow each liner operator to enter into any confidential contract and to offer any arrangement and pricing of its liner shipping services.

4.2 VOLUNTARY DISCUSSION AGREEMENTS

33. The VDA are agreements between liner operators in which the parties to such agreements may exchange and review commercial issues relating to market data, supply and demand forecasts, international trade flows and industry trends, and voluntary and non-binding guidelines. The agreements shall not contain any element of price fixing or price recommendation by the any person on transport users.
34. The VDA shall not impose any penalty on any liner operator which deviates from any term of the agreement or withdraws from the agreement. It must allow any liner operator to withdraw from the agreement by giving notice within a reasonable period to the other liner operators.
35. The VDA shall not require the disclosure of any confidential information concerning the liner shipping service arrangements to any transport user by any liner operator. In addition, it should allow each liner operator to enter into any confidential contract and to offer any arrangement and pricing of its liner shipping services.

5. OVERVIEW OF EXEMPTIONS FOR LINER SHIPPING AGREEMENTS IN OTHER JURISDICTIONS

36. In some jurisdictions such as Australia, Canada, Japan, India, New Zealand and the United States, exemptions are granted under the specific statutory provisions. Meanwhile in other jurisdictions such as the European Union (EU), Singapore, Hong Kong and Malaysia, exemptions are granted under the block exemption regime.
37. The duration of exemption for the liner shipping agreements vary across different jurisdictions based the maritime trade volume, socio-economic systems and economic development of the respective countries.

5.1 JURISDICTIONS THAT GRANTED EXEMPTIONS FOR VSA ONLY

i) European Union

38. The first consortia⁷ block exemption regulation was adopted by the EU in 1995. However, the European Commission (EU Commission) launched a comprehensive revision of the competition rules that apply to maritime transport in 2003 and

⁷ Consortia refer to “agreements or arrangements between liner shipping companies aimed primarily at supplying jointly organized services by means of various technical, operational or commercial arrangements (e.g. joint use of vessels, port installations, marketing organizations, etc.)” (UNCTAD: Discussion Papers on “Liner Shipping: Is There a Way for More Competition?” page no. 4, available at [www.http://unctad.org/en/PublicationsLibrary/osgdp2016d1_en.pdf](http://unctad.org/en/PublicationsLibrary/osgdp2016d1_en.pdf))

led the Council of the EU to repeal⁸ the exemption from EU competition rules for liner shipping conferences in 2006.

39. The EU Commission had adopted a new Block Exemption Regulation (BER) after revisiting the exemption for liner shipping consortia from the EC Treaty's ban on restrictive business practices (Article 81)⁹. The BER was granted up to April 2010 and it was extended for another five years until 2015. On 24 June 2014, the EU Commission had announced to extend the validity of special competition regime for liner shipping consortia¹⁰ until April 2020.

ii) India

40. In India, the exemption of the VSA in respect of liner shipping services under their section 3 of the Competition Act 2002 was first granted in 2013. The Ministry of Corporate Affairs had since extended the exemption of the VSA on a yearly basis and the latest exemption just lapsed on 1 March 2017. The exemption of the VSA does not include concerted practices involving fixing of prices, limitation of capacity or sales and the allocation of market or consumers. The Director General of Shipping from the Ministry of Shipping is responsible in monitoring the VSA during the exemption period¹¹.

⁸ Press Release Database of the European Commission, Antitrust: Commission adopts new Block Exemption Regulation for liner shipping consortia - frequently asked questions

⁹ Press Release from the European Commission, Antitrust: Commission adopts new Block Exemption Regulation for liner shipping consortia dated 28 September 2009

¹⁰ Press Release from the European Commission, Antitrust: Commission extends validity of special competition regime for liner shipping consortia until April 2020 dated 24 June 2014

¹¹ The Gazette of India - Extraordinary, Merchant Shipping Notice No. 3 of 2016 by the Ministry of Corporate Affairs dated 2 March 2016

5.2 JURISDICTIONS THAT GRANTED EXEMPTIONS FOR BOTH VSA AND VDA

i) Japan

41. In Japan, the system of exemption under the Antimonopoly Act (AMA) for the international ocean shipping was originally established based on the Maritime Transport Act (Act No. 187 of 1949) and it was reviewed three times that is, 1999, 2006 and 2010. After five years of the previous review, the Japan Fair Trade Commission (JFTC) found that the function of conferences almost disappeared under the investigation of the case concerning international ocean shipping. The JFTC accordingly conducted a fact-finding survey on the actual conditions of international ocean shipping as well as the actual state of exemption from the AMA for international ocean shipping to ascertain the relevance of maintaining the system of exemption from the AMA¹².

42. JFTC concluded that it is not necessary to make conferences, discussion agreements, consortia and carrier agreements exempted from the AMA. It was considered there was no reason for maintaining the system of exemption from the AMA for international ocean shipping. Nonetheless, the Ministry of Land, Infrastructure, Transport and Tourism announced on 14

¹² Review of the System for Exemption from the Antimonopoly Act for International Ocean Shipping by the Japan Fair Trade Commission (JFTC), February 2016

June 2016 that it decided to maintain the system of exemption from the AMA¹³.

ii) Singapore

43. In Singapore, the block exemption order in respect of liner shipping services was originally granted in 2006 and reviewed in 2010 and 2015. The Competition Commission of Singapore (CCS) recommended to the Minister of Trade and Industry to extend the block exemption order for another five years until 31 December 2020 on the same previous terms¹⁴. The parties to liner shipping agreements with an aggregate market share of above 50% are required to file their agreements and any variation or amendment with the CCS, in addition to the fulfilment of other conditions and obligations in the block exemption order, to qualify for the block exemption from the section 34 prohibition.

iii) Australia

44. Australia has provided liner shipping services with immunity from its competition laws for almost 50 years. Based on the recommendation from the Competition Policy Review in 2015 (also known as Harper Review), the statutory exemption is to be repealed and the Australian Competition and Consumer Commission to be given the power to grant block exemptions for conference agreements that meet a minimum standard of

¹³ Press release from the Japanese Ministry of Land, Infrastructure, Transport and Tourism dated 14 June 2016

¹⁴ The Singapore Government Gazette, Electronic Edition dated 25 November 2015

pro-competitive features¹⁵. However, the Australian Government still “remains open” towards the recommendation of the Harper Review¹⁶.

iv) New Zealand

45. In New Zealand, the exemptions for international shipping are provided in section 44(2) of the Commerce Act 1986 and section 14 of the Shipping Act 1987. They collectively exempt the international carriage of goods by sea from Parts 2 and 4 of the Commerce Act¹⁷. The Productivity Commission conducted an inquiry into International Freight Transport in 2011/2012 on international shipping and found no valid reason for exemptions to the Commerce Act to remain.

46. The Commerce (Cartels and Other Matters) Amendment Bill was introduced in Parliament which enable the liner shipping markets to have a two year transition period. The liner shipping agreements would be subject to the general competition regime under the New Zealand Commerce Commission¹⁸.

¹⁵ Competition Policy Review Final Report, March 2015 (also known as Harper Review) page no. 385

¹⁶ Australian Government response to the Harper Competition Policy Review: a quick guide dated 7 September 2016

¹⁷ Regulatory Impact Statement - Regulation of competition in international shipping, prepared by the Ministry of Business, Innovation and Employment.

¹⁸ OECD – Competition Issues in Liner Shipping, Contribution from New Zealand, 4 June 2015

v) The United States

47. In the United States, the Shipping Act 1984 as amended by the Ocean Shipping Reform Act of 1998 (OSRA), provides an alternative competition enforcement regime that includes limited antitrust immunity for ocean common carrier agreements from the antitrust laws. The individual members are allowed to negotiate independent confidential service contracts with shippers and prohibits the group from taking any retaliatory action against shippers or carriers that do so¹⁹.

Summary

48. In summary, competition authorities or relevant government agencies across different jurisdictions acknowledged the importance of granting an exemption for the VSA in respect of liner shipping services. However, there are different views towards the relevance of maintaining an exemption for the VDA in respect of liner shipping services.

¹⁹ OECD – Competition Issues in Liner Shipping, Contribution from the United States, 19 June 2015

6. LEGAL AND ECONOMIC ASSESSMENTS

49. As of 14 April 2017, the Commission has received 250 of VSA and VDA in respect of liner shipping services. In addition, neither the Commission nor the Maritime Division of the Ministry of Transport received any complaints alleging any anti-competitive conduct in relation to the BEO in respect of liner shipping services.
50. Over the past three years, there are no significant changes in the ranking of top 20 liner shipping companies and total shipboard capacity deployed in TEU except for Hanjin Shipping which used to rank 8th out of 20 leading shipping companies had filed for bankruptcy protection on 31 August 2016 and officially declared bankrupt by the South Korean court on 17 February 2017.
51. In 2016 the following were the leading liner shipping companies and their market share²⁰:
- (i) Maersk (15.1%);
 - (ii) Mediterranean Shipping Company (13.4%);
 - (iii) CMA CGM (9.2%);
 - (iv) China Ocean Shipping (Group) Company (7.8%);
 - (v) Hapag-Lloyd (4.8%);
 - (vi) Evergreen (4.7%), Hamburg Süd (3.3%);
 - (vii) Orient Overseas Container Line (3.0%);

²⁰ UNCTAD Review of Maritime Transport 2016 page no. 40

- (viii) Neptune Orient Lines – American President Lines (2.8%);
- (ix) Mitsui Osaka Shosen Kaisha (2.7%);
- (x) Yang Ming Marine Transport (2.6%);
- (xi) United Arab Shipping Company (2.6%);
- (xii) Nippon Yusen Kaisha (2.5%);
- (xiii) Hyundai Merchant Marine (2.0%);
- (xiv) Kawasaki Kisen Kaisha Limited (1.9%);
- (xv) Zim Integrated Shipping Services (1.7%);
- (xvi) Pacific International Lines (1.7%);
- (xvii) Wan Hai Lines (1.3%); and
- (xviii) X-Press Feeders (0.7%)

6.1 RELIEF OF LIABILITY UNDER SECTION 5 OF THE ACT

52. The Commission having considered the Application is of the view that the application for the renewal of BEO has fulfilled all the four requirements under section 5 of the Act. The renewal would enable the New Applicants to be relieved of its liability for the infringement of prohibition under the section 4 based on the following grounds:

- (a) There are significant identifiable technological, efficiency or social benefits directly arising from the VSA and VDA

In line with the previously granted BEO, the Commission acknowledges that the shipping industry requires high investment in vessels and operating cost for services. It is

therefore crucial for the liner shipping operators to cooperate among themselves to maintain the quality of services that is able to ensure scheduled shipping services. In addition, frequency and regularity have to be observed and maintained for the benefit of the industry's stakeholders particularly the shippers. In this regard, the VSA and VDA allow liner operators to provide regularized scheduled services between large number of ports and many more destinations worldwide.

(b) The benefits could not reasonably have been provided by the parties to the VSA and VDA without the agreement having the effect of preventing, restricting or distorting competition

The VSA and VDA enable the liner shipping industry to continue to invest in ships, vessels, equipment, infrastructure, information technology and other technological innovations in order to be able to continue providing liner shipping services. In this regard, scheduled and regular services cannot be provided at lower costs and regularity unless there is an agreement between competitors. The benefits could not have been provided unless there are agreements in place between liner operators. This is in line with the nature of the liner shipping industry in providing scheduled services to its customers.

(c) The detrimental effect of the VSA and VDA on competition is proportionate to the benefits provided

The Commission found that the detrimental effect of the agreements between the liner operators to provide such services is countered by the benefits brought about by such agreements. This is vital in maintaining stability in the trade and regular services particularly in satisfying the demands for services within its connectivity network.

Regularized and scheduled services allow for greater frequencies, lower costs and availability for the shippers regardless of size and regularity of shipments.

(d) The VSA and VDA do not allow the liner operators to eliminate competition completely in respect of a substantial part of the liner shipping services

The Commission is of the view that the proposed BEO will not allow any form of price fixing or tariff agreements or recommendation between liner operators. This condition is important so as to ensure that the liner operators can provide independent rates to shippers and compete on pricing. Confidentiality of service contracts between operators and shippers is also an important element which can be maintained as there can be no compulsion in the VSA and VDA to share such information.

These agreements do not eliminate competition completely as any party may individually fix rates or prices and is free to compete on pricing and level of service.

The proposed BEO also does not exempt or provide immunity in respect of any abuse of a dominant position under the section 10 of the Act.

6.2 APPLICATION TO EXTEND THE SCOPE OF THE VDA

53. The Commission is not in agreement with the application to extend the scope of the BEO to allow the liner operators who are parties to the VDA to discuss and agree on voluntary and non-binding recommendations relating to rates, charges and other commercial terms.

54. The Commission is of the view that it may become an avenue for the liner operators to infringe section 4(2) of the act by fixing rates or prices and which may bring harm to the consumers.

7. CONCLUSION AND PROPOSED BLOCK EXEMPTION

55. In short, the Commission is of the opinion that the application for the renewal of BEO has satisfied all the four requirements under the section 5 of the Act.

56. The Commission accordingly, propose to allow another block exemption in respect of liner shipping services for another two years. A review on the block exemption will be conducted when necessary.
57. The Commission is of the view not to extend the scope of the block exemption to allow the liner operators who are parties to the VDA to discuss and agree on voluntary and non-binding recommendations relating to rates, charges and other commercial terms.
58. Liner shipping services referred to in the renewal of block exemption is in respect of ocean transport and shall not include any inland carriage of goods which is part through transport such as the services provided by logistics providers, forwarders, depot operators, truckers, railroaders, off-dock consolidation facility service providers, and off-dock storage and warehousing service providers.
59. The VSA referred to in the renewal of block exemption means an agreement in which the members of such agreement shall only discuss and agree on operational arrangements relating to the provision of liner shipping services, including the coordination or joint operation of vessel services, and the exchange or charter of vessel space. The agreement shall not include any agreement or recommendation relating to rates and tariff on transport users.

60. The VDA referred to in the renewal of block exemption means an agreement in which the liner operator members of such agreement may exchange and review market data, supply and demand forecasts, international trade flows and industry trends, and voluntary and non-binding guidelines. The agreement shall not contain any element of price fixing, price recommendation or tariff imposition by any person on transport users.
61. Section 9 of the Act provides the procedure for block exemption and reads as follows:

Procedure for block exemption

9. The Commission shall, before granting a block exemption—

- (a) publish details of the Commission's proposed block exemption;
- (b) give at least thirty days from the date of publication to allow any submission to be made by members of the public in relation to the proposed block exemption; and
- (c) give due consideration to any submission made.

62. The Commission in accordance with section 9 shall publish the details of its proposed block exemption on its website at www.mycc.gov.my for at least thirty (30) days from the date of publication to allow any submission to be made by members of the public. The members of the public shall be given until 5p.m. on 9 June 2017 for their submissions. The Commission shall give due consideration to any submissions made.

7.1 Obligations under block exemption

63. The following are the obligations to be imposed under the block exemption:

- (a) A copy of a VSA and VDA shall be filled by one of the liner operators with the Commission within two weeks from the date of signing;
- (b) Where any variation or amendment is made to a VSA or VDA after the filling of the agreement under subparagraph (1), one of the liner operators shall file the variation or amendment in writing with the Commission within two weeks from the date of the variation for amendment;
- (c) Where the variation or amendment referred to in subparagraph (2) is not made in writing, one of the liner operators shall file with the Commission a memorandum providing a detailed description of the variation or amendment within two weeks from the date of variation or amendment;
- (d) Upon request by the Commission, a liner operator shall make available to the Commission any document or information relating to the liner shipping services or other services provided by the liner operator under the VSA or VDA in such form and within such period as determined by the Commission; and

- (e) Upon request by any transport user of any information concerning pricing or tariff of the liner shipping services, or the structure and service level of the liner shipping services, under the VSA and VDA, a liner operator shall make available such information:
 - (i) at the offices of the liner operator or its agents in Malaysia; and
 - (ii) at a publicly available internet website.

7.2 Cancellation of block exemption

- 64. The Commission has proposed the condition that in granting the block exemption it may by notice in writing to the liner operators, cancel the block exemption granted if there is a breach of any condition stipulated in the exemption order.
- 65. Where there is a failure to comply with any obligation imposed in the exemption order or when the Commission considers that the VSA or VDA is an agreement to which section 5 of the Act applies, the Commission may cancel the exemption with effect from the date the Commission may specify in the notice.