



NEWS RELEASE

MyCC GRANTS CONDITIONAL BLOCK EXEMPTION FOR LINER SHIPPING AGREEMENTS

KUALA LUMPUR, 19th December 2013 – The Malaysia Competition Commission (MyCC) grants a conditional Block Exemption Order (BEO) for liner shipping agreements in respect of Vessel Sharing Agreements and Voluntary Discussion Agreements made within Malaysia or has an effect on the liner shipping services in Malaysia. This BEO is granted under section 8 of the Competition Act 2010 (the Act) and the MyCC is satisfied all requirements under Section 5 of the Act have been fulfilled.

The BEO is to come into operation on the date it is published in the Gazette and shall continue in force for three years from that date or until the same is cancelled by the MyCC. A review of the BEO will be conducted by the MyCC after two (2) years from the date of its commencement.

This BEO only applies to transport services provided by liner operators in respect of ocean transport and does not include any inland carriage of goods occurring as part of through transport including services provided by logistic providers, forwarders, depot operators, truckers, railroads, off-dock consolidation service providers, and off-dock storage and warehousing service providers, whether or not such entities are affiliated with liner operators. In addition, no element of pricing or tariff in any form is allowed in respect of the exempted services.

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



The MyCC's decision to grant the BEO was based on studies conducted on the industry, and after consultations with stakeholders including the relevant government agencies, such as Ministry of Finance (MOF), Ministry of Transport (MOT), Ministry of International Trade and Industry (MITI) and Economic Planning Unit (EPU). A nationwide public consultation was also held over a period of a few months beginning February this year and submissions from all stakeholders were taken into account in drawing up the BEO.

The BEO follows the block exemption application made by the Malaysia Shipowners Association (MASA), Shipping Association of Malaysia (SAM) and Federation of Malaysian Port Operators Council (FMPOC) filed with the MyCC previously.

Information on the BEO is also available for viewing on the MyCC website, www.mycc.gov.my.

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MEDIA: Please refer to **Annexe A** below for additional background information.

For media enquiries, please contact:

Rowena Wong, Tel +603 2273 2277 (ext 111), Email: rowena@mycc.gov.my

Anis Syafiq, Tel +603 2273 2277 (ext 217), Email: anis@mycc.gov.my

Corporate Communication Unit

Malaysia Competition Commission

About Malaysia Competition Commission (MyCC)

Established in June 2011, MyCC is an independent body responsible for enforcing the Competition Act 2010, which was implemented to create healthy competition which would in turn stimulate productivity and innovation, thus creating wider choices of products for consumers with better quality and reasonable prices.

The Act applies to all commercial activities undertaken within and outside Malaysia that affects competition in the Malaysian market. It provides a regulatory framework including powers to investigate, adjudicate and impose penalties on the perpetrators of the competition laws.

For more information on the Act and MyCC activities, log on to www.mycc.gov.my.

ANNEXE A

Notes to Editor:

Below is information on Section 4, 5, 8 and 10 of the Competition Act 2010. Further details on the BEO such as definitions, meeting requirements of Section 5 and applicable conditions are in the Explanatory Note (page 11) below.

Section 4: Prohibited horizontal and vertical agreement

4. (1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.
- (2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to—
- (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
 - (b) share market or sources of supply;
 - (c) limit or control—
 - (i) production;
 - (ii) market outlets or market access;
 - (iii) technical or technological development; or
 - (iv) investment; or
 - (d) perform an act of bid rigging, is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.
- (3) Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.

Section 5: 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.

Section 8: 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.

Section 10: Abuse of dominant position

10. (1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

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- (2) Without prejudice to the generality of subsection (1), an abuse of a dominant position may include—
- (a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;
 - (b) limiting or controlling—
 - (i) production;
 - (ii) market outlets or market access;
 - (iii) technical or technological development; or
 - (iv) investment, to the prejudice of consumers;
 - (c) refusing to supply to a particular enterprise or group or category of enterprises;
 - (d) applying different conditions to equivalent transactions with other trading parties to an extent that may—
 - (i) discourage new market entry or expansion or investment by an existing competitor;
 - (ii) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or
 - (iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;
 - (e) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract;
 - (f) any predatory behaviour towards competitors; or
 - (g) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.
- (3) This section does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.
- (4) The fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in that market.

Explanatory Note

COMPETITION (BLOCK EXEMPTION FOR VESSEL SHARING AGREEMENTS AND VOLUNTARY DISCUSSION AGREEMENTS IN RESPECT OF LINER SHIPPING) ORDER 2013

1. Introduction

1.1 This explanatory note is not a substitute for the Block Exemption Order (BEO). Persons in doubt about how they and their commercial activities may be affected by the BEO may wish to seek independent legal advice.

1.2 An application for a block exemption was submitted by the Malaysia Shipowners Association (MASA), the Shipping Association of Malaysia (SAM) and the Federation of Malaysia Port Operators Council (FMPOC) on 16 December 2011 pursuant to section 8 of the Competition Act 2010. The applicants sought a 5 year block exemption to be granted by the Malaysia Competition Commission (Commission) for liner shipping agreements in respect of 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.

1.3 This BEO granted by the Commission is made under section 8 of the Competition Act 2010 and exempts VSA and VDA in respect of liner shipping. The Commission has granted the block exemption with conditions under section 8 of the Act and the Commission is satisfied that all the four requirements under section 5 has been fulfilled:

- (a) There are significant identifiable efficiency benefits arising from the VSA and VDA



High investment in vessels and operating cost for services require the need to have co-operation between liner operators to maintain the quality of services that is able to meet frequency and regularity which are the defining characteristics of scheduled shipping services for the benefit of the industry, including shippers. VSA and VDA allow liner operators to provide regularised 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 nature of the liner shipping industry is such that its ability to provide scheduled services necessarily requires agreements among companies which would normally be competitors. VSA and VDA enable the liner shipping industry to continue investing billions of dollars in ships, new vessel services, equipment, infrastructure, information technology and other technological innovations in order to be able to continue providing liner shipping services. Scheduled and regular services cannot be provided at lower costs and regularity unless there is an agreement between competitors. These benefits could not have been provided unless there are agreements in place between liner operators.

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

There has to be stability in the trade and regular services to meet the



latent demand of shippers for services to include shipping small lots of cargoes to various destinations in the network of scheduled services. The detrimental effect of the agreements between the liner operators to provide such services is countered by the benefits brought about by such agreements.

Regularised 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 liner operators to eliminate competition completely in respect of a substantial part of the liner shipping services

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

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

Further to this, the BEO does not exempt or provide immunity in respect of any abuse of a dominant position under section 10 of the Act.

1.4 All agreements relating to the exempted services shall be lodged with the

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- Commission to ensure compliance of the conditions imposed. Relevant parts of the documents shall also be made available and easily accessible to the public.
- 1.5 In the course of assessing the block exemption application filed by the Applicants, the Commission had carefully considered many factors which would contribute to the determination of the Commission's decision. On this note, the Commission engaged various stakeholders to get their feedback including the relevant government agencies in particular, 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). A series of public consultations were also held in Kuala Lumpur, Penang, Kota Kinabalu, Kuching and Johor Bahru which were aimed at obtaining feedback from the other stakeholders including the freight forwarders, hauliers as well as manufacturers.
- 1.6 Apart from the Applicants, other stakeholders who had provided written responses on the block exemption application during the public consultations are listed as below:
- a) DIC Compounds (Malaysia Sdn. Bhd.);
 - b) Malaysia Steel and Metal Distributors' Association;
 - c) Malaysia Hardware, Machinery & Building Material Dealers' Association;
 - d) Federation of Malaysia Manufacturers;
 - e) Malaysian International Chambers of Commerce and Industry; and
 - f) Federation of Sabah Manufacturers (Jointly submitted 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.

1.7 After taking into consideration all the feedback and findings, the Commission has agreed to grant the block exemption subject to the following additional conditions.

1.8 The BEO granted by the Commission however is not for the whole of the intra-modal transport services (including the land carriage of goods and warehousing services) as requested by the Applicants. In addition, no element of

pricing or tariff in any form is allowed in respect of these services.

- 1.9 The BEO shall only apply to transport services provided by liner operators in respect of ocean transport and shall not include any inland carriage of goods occurring as part of through transport including services provided by logistics 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 liner operators.

2. Commencement and Duration

This BEO shall come into force on the date it is published in the Gazette and shall continue in force for three years from the same date or until the BEO is cancelled by the Commission as provided under section 8(5) of the Act. A review of the BEO will be conducted by the Commission after two (2) years from the date of its commencement.

3. Definitions

Liner operator

- 3.1 A liner operator is defined as an enterprise which provides liner shipping services and is a party to a VSA and/or VDA.

Liner shipping services

- 3.2 Liner shipping services is defined as the containerised 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. Full vessel chartering arrangements with customers, such as tanker and bulk vessel operations are excluded from this BEO.

3.3 It shall only include services provided by liner operators in respect of ocean transport and excludes all inland carriage of goods occurring as part of through transport including services provided by logistics 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 liner operators. Such services of inland carriage of goods shall be subject to the Act.

VSA

3.4 VSA 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.

VDA

3.5 VDA means an agreement in which the liner operator members to such agreements may exchange and review market data, supply and demand forecasts, international trade flows and industry trends, and discuss and agree to such similar commercial issues.

4. Exempted VSA and VDA

4.1 To qualify for exemption, the parties of the VSA and VDA must adhere to the conditions set out under paragraph 4(1) of the BEO.

4.2 VSA

- (i) shall only be for the sharing of vessels, joint operation of vessel services, exchange or charter of vessel space between the liner operators;
- (ii) shall not include any inland carriage of goods occurring as part of through transport including services provided by logistics 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 liner operators;
- (iii) shall be for a reasonable period of time;
- (iv) shall not contain any element of price fixing or price or tariff recommendation by the parties imposed on the transport users;
- (v) shall not require the disclosure, whether to other liner operators or otherwise, of confidential information concerning service arrangements by the liner operators; and
- (vi) shall allow any party to the agreement on the basis of an individual to enter into any confidential contract and to offer his own service arrangements and pricing.

4.3 VDA

- (i) shall only be for the sharing of information relating to the industry and shall be non-binding on the parties;
- (ii) shall not include any inland carriage of goods occurring as part of through transport including services provided by logistics 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 liner operators;
- (iii) shall be for a reasonable period of time;
- (iv) shall not contain any element of price fixing or price recommendation by the parties imposed on the transport users;
- (v) shall not impose any penalty or financial loss imposed on any party departing from the agreement;
- (vi) shall allow any party to the agreement to withdraw from the agreement on giving a reasonable period of notice;
- (vii) shall not require the disclosure, whether to other liner operators or otherwise, of confidential information concerning service arrangements by the liner operators; and
- (viii) shall allow any party to the agreement on the basis of an individual to

enter into any confidential contract and to offer his own service arrangements and pricing.

4.4 The VSA and VDA do not require liner operators to mandatorily adhere to a tariff and there cannot be any obligation on any party to disclose confidential information concerning the individual confidential contracts and their individual service agreements.

4.5 These conditions have been included in the BEO to promote competition between parties to a VSA and VDA, and limit the extent of anti-competitive conduct that liner operators may engage in through the VSA and VDA.

5. Cancellation of the Exemption

5.1 Paragraph 5 of the BEO provides for the cancellation of the block exemption in respect of the VSA and VDA. This is in line with the provisions of section 8(5) of the Act.

5.2 Where there has been a breach of any conditions imposed in the BEO, the Commission may proceed to take relevant action to cancel the BEO pursuant to section 8(5) of the Act.

5.3 Where there has been a failure to comply with an obligation imposed in the BEO or where the Commission finds in a particular case that the VSA and VDA have effects which are incompatible with the provisions of section 5 of the Act, the Commission may cancel the exemption from such date as the Commission may specify.