

MyCC PROPOSES GRANTING BLOCK EXEMPTION FOR LINER SHIPPING AGREEMENTS

Public Consultation to be held

KUALA LUMPUR, 14th February 2013 – The Malaysia Competition Commission (MyCC) plans to issue a Proposed Block Exemption Order (BEO) for liner shipping agreements made within Malaysia or has an effect on the liner shipping services market in Malaysia. This Proposed BEO will be granted under Section 8 of the Competition Act 2010 (hereinafter referred to as the 'Act') provided all the conditions under Section 5 of the Act are satisfied.

The Proposed 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) previously.

According to MyCC CEO, Pn Shila Dorai Raj, the proposal was drafted based on studies conducted on the industry, and after consultations with the relevant government agencies: Ministry of Finance (MOF), Ministry of Transport (MOT), Ministry of International Trade and Industry (MITI) and Economic Planning Unit (EPU).

The MyCC may grant the Proposed BEO if it is satisfied in that:

- (a) there are significant identifiable efficiency benefits arising from the liner shipping agreements;
- (b) the benefits could not reasonably have been provided by the parties to the liner shipping agreement without the agreement having the effect of preventing, restricting or distorting competition;
- (c) the detrimental effect of the liner shipping agreements on competition is proportionate to the benefits provided; and

(d) the liner shipping agreement does not allow liner operators to eliminate competition completely in respect of a substantial part of the liner shipping services.

The proposed duration of the BEO is three years. After two years, should the need arise, the MyCC may review the exemption. The final BEO will be made in June after the MyCC has evaluated submissions received during the Public Consultation on the proposal. Spearheading the consultation is MyCC Member of Commission, Tn Ragnath Kesavan.

It has to be noted that Section 10 of the Act is not part of the Proposed BEO, hence, parties to a liner shipping agreement can still be found liable for an infringement if they are found abusing their dominant positions in the liner shipping market. The Proposed BEO also does not cover inland carriage of goods and warehousing of goods. The Proposed BEO additionally allows liner shipping operators to offer, on the basis of individual confidential contracting, their own service arrangements, upon certain conditions (refer to Annexe A for details).

Public Consultation

A 30-day public consultation will be held starting 19th February 2013. The Proposed BEO and consultation documents will be available for download from the MyCC website at www.mycc.gov.my on the same date. The closing date for submissions is 18 March 2013. All submissions may be sent by post or fax to the MyCC office, and/or by email to consultation@mycc.gov.my.

A series of roadshows will also be held at the following locations and dates:

- a) 19 February 2013 –Kuala Lumpur (Hilton Hotel)
- b) 21 February 2013 – Penang (Equatorial Hotel)
- c) 25 February 2013 – Kota Kinabalu (The Magellan Sutera Hotel)
- d) 26 February 2013 – Kuching (Hilton Hotel)
- e) 28 February 2013 – Johor (Thistle Hotel)

To take part in the public consultation at any of the above locations, kindly email consultation@mycc.gov.my or contact Dhaniah or Zairan at +603 2273 2277.

Please refer to Annexe A for additional background information.

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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:

Information on Section 4, 5, 8 and 10 of the Competition Act 2010

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.
- (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.

Additional Information on the Proposed Block Exemption Order (BEO)

1. Liner shipping services means the transport of goods on a regular basis on any particular route between ports and in accordance with timetables and sailing dates advertised in advance and made available, even on an occasional basis, by a liner operator to any transport user against payment.
2. Section 10 of the Act is not part of the Proposed BEO, hence, parties to a liner shipping agreement can still be found liable for an infringement by abusing its dominant position in the liner shipping market.
3. The price of liner shipping services must be clearly and expressly stipulated in the liner shipping agreement. Any attempt to raise prices pursuant to a liner shipping agreement will be viewed unfavourably by the MyCC and may be taken as evidence of an infringement of Section 10 of the Act. Parties to a liner shipping agreement

shall consult transport users before making any price increase.

4. The Proposed BEO allows liner shipping operators to offer, on the basis of individual confidential contracting, their own service arrangements. This is not a carte blanche for liner shipping operators as the following conditions are imposed:
 - (a) The duration of any liner shipping agreement shall not exceed 2 years.
 - (b) Liner operators are authorised to withdraw at any time from a liner shipping agreement.
 - (c) Liner operators shall have the liberty to depart from a liner shipping agreement at any time, without any requirement of notice or financial repercussions, with respect to lowering price.
 - (d) Copies of the liner shipping agreements shall be filed with MyCC. Relevant information from these agreements shall be published by MyCC.
 - (e) Any variation or amendment to the liner shipping agreements shall be notified to MyCC within 30 calendar days from the date of the variation or amendment.

Mode of Consultation

1. Public consultation submissions sent to the MyCC office may be sent via the following methods:

Email : consultation@mycc.gov.my
Post : Malaysia Competition Commission
Level 15, Menara SSM@Sentral,
No.7, Jalan Stesen Sentral 5,
Kuala Lumpur Sentral
50623 Kuala Lumpur
Fax : +603 2272 1692

2. All submissions must be made by or before noon 18th March 2013.
3. Members of the public who wishes to participate in the public consultation at the selected roadshow venues are to email their details to consultation@mycc.gov.my or contact Dhaniah or Zairan at +603 2273 2277.