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Working Party No. 2 on Competition and Regulation

COMPETITION ISSUES IN LINER SHIPPING

-- United States --

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More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/competition-issues-in-liner-shipping.htm>

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-- The United States --

1. The submission describes the United States' statutory antitrust exemption for ocean shipping carrier rate discussions, beginning with a history of the exemption and subsequent amendments. It then discusses the ongoing Department of Justice enforcement against an international shipping cartel involving roll-on, roll-off cargo. It concludes with a summary of regulatory enforcement related to ocean shipping services.

2. The Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (OSRA),¹ provides an alternative competition enforcement regime that includes limited antitrust immunity for ocean common carrier agreements from the antitrust laws. The Federal Maritime Commission (FMC) is the independent regulatory agency "responsible for the regulation of oceanborne transportation in the foreign commerce of the United States for the benefit of U.S. exporters, importers, and the U.S. consumer."² The FMC's strategic goals are (1) to ensure "competitive and efficient ocean transportation services for the shipping public" by, *inter alia*, monitoring agreements among carriers and certain confidentially filed service contracts for effects on price and service, and (2) to "protect the shipping public from unlawful, unfair and deceptive ocean transportation practices and resolve shipping disputes."³

1. History of the U.S. Exemption for Ocean Shipping Conferences

3. The Shipping Act of 1916 is the oldest surviving U.S. statutory antitrust exemption.⁴ Since 1916, there has been an exemption, in one form or another, from the antitrust laws for ocean shipping carriers to engage in rate discussions and price-fixing agreements. While outlawing certain specified monopolistic conference practices, the 1916 Act expressly conferred an exemption from the antitrust laws for conference agreements on shipping rates, pooling arrangements, and shipping route allocations, so long as those agreements were first submitted to and approved by the newly created U.S. Shipping Board (the body that eventually became the FMC).⁵

4. Following enactment of the 1916 Act, conferences began making extensive use of "dual rate" contracts to bind shippers to the conferences and stave off non-conference carrier competition. These dual-rate contracts, also referred to as "loyalty contracts," offered discounted rates to shippers who agreed to use only conference carriers. The Supreme Court ruled in *Federal Maritime Board v. Isbrandtsen Co.*⁶ that dual rate contracts violated the Act.

5. In the wake of the *Isbrandtsen* decision, Congress amended the 1916 Act in 1961 to permit dual-rate contracts, though limiting the permissible discount to 15 percent. At the same time, Congress amended the Act to require the filing of tariffs, transferred the Board's authority to the independent FMC, and gave the FMC the power to disapprove agreements between and among carriers that were "contrary to the public interest."⁷

¹ Shipping Act of 1984, 46 U.S.C. App. §§ 1701-1719, as amended by the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998).

² Federal Maritime Commission, 53rd Annual Report for Fiscal Year 2014, p. 3, *available at* <http://www.fmc.gov/assets/1/Page/53rdAnnualReport.pdf>.

³ *Id.*, at 3-4.

⁴ ABA Section of Antitrust Law, *Federal Statutory Exemptions from Antitrust Law* (2007), at 36.

⁵ Statement of Charles James, Ass't Atty. Gen., before the Committee on the Judiciary, U.S. House of Representatives, concerning H.R. 1253, the Free Market Antitrust Immunity Reform Act of 2001 (June 5, 2002), 1-2, *available at* <http://www.justice.gov/atr/public/testimony/11244.htm>.

⁶ 356 U.S. 481 (1958).

⁷ James testimony, *supra* n. 5, at 2.

2. The Shipping Act of 1984

6. In 1984, Congress substantially rewrote the 1916 Act. The Shipping Act of 1984 revised the antitrust exemption for carrier agreements and streamlined the regulatory process for those agreements. The antitrust exemption was revised to cover not only agreements that had gone into effect under the Act, but also activities, “whether permitted under or prohibited by this Act,” if they were undertaken “with a reasonable basis to conclude” that they were pursuant to an effective agreement. The antitrust exemption was further revised to cover intermodal through rates incorporating rail, truck, and ocean legs of particular cargo movements. The 1984 Act abolished the FMC’s public interest standard for reviewing carrier agreements. A carrier agreement would no longer require FMC “approval,” but would go into effect -- and thereby become immunized from the antitrust laws -- 45 days after filing or submission of any additional information requested by the FMC.

7. As a result of the 1984 Act, once an agreement has been filed, the only way it can be challenged as anticompetitive is if the FMC successfully seeks to have a court enjoin the agreement on grounds that it is “likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.”⁸ The 1984 Act otherwise retained the common carrier provisions of the 1916 Act, as amended in 1961, under which the conferences are required to file published tariffs with the FMC, as well as the list of specified prohibited acts. The Act provided for the use of service contracts in limited circumstances.⁹

3. The Ocean Shipping Reform Act (OSRA)

8. The passage of OSRA in 1998 was a significant deregulatory step. Although carrier agreements retain their antitrust immunity, and members can still publish voluntary collective service guidelines under their agreement authority, OSRA permits individual members to negotiate independent confidential service contracts with shippers, and prohibits the group from taking any retaliatory action against shippers or carriers that do so. As a result, independent service contracts now dominate the traffic carried by carriers, including those that belong to rate agreements and conferences (to the extent they are even relevant to international competition).¹⁰

9. Despite these shipper benefits from independent service contracts, the exemption still denies the full benefits of competition. For example, OSRA allows agreement members to adopt “voluntary” guidelines regarding individual service contracts, which members to an agreement can use to signal

⁸ The FMC construed the “public interest” standard in the 1961 amendment to mean that agreements that would violate policies of the antitrust laws were *prima facie* contrary to the public interest, and proponents had the burden of showing that they were justified by transportation need or regulatory purposes. The Supreme Court upheld that decision in *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243-44 (1968), and it became the cornerstone of subsequent Shipping Act regulation of agreements. The 1984 Act replaced the prior approval and public interest standard so construed with a notification procedure of filing and automatic effectiveness under section 6(c) of the Act (Public Law 98-237, March 20, 1984), but with a list of objective conditions that conference agreements had to meet, including a member right of independent action under section 5(b). The FMC could invoke the broader “substantially anticompetitive” standard under the 1984 Act, but it had to do so in court, and it bore the burden of proof. We are not aware of the FMC ever filing such a challenge to an agreement between carriers, although it has challenged an allegedly anticompetitive agreement between other regulated entities (Marine Terminal Operators).

⁹ James testimony, *supra* n. 5, at 2-3.

¹⁰ According to the FMC’s 2014 Annual Report, *supra* n. 2, p. 9, “conference or price fixing agreements have become largely irrelevant to U.S. liner shipping. No new carrier conference agreements have been filed with the [FMC] since fiscal year 2000. The remaining three conferences cover only government cargoes.”

expected behavior. This could discourage vigorous competition with respect to individual service contracts. These and other provisions of OSRA perpetuate harm from the conference system, either by facilitating intercarrier agreements that would be unlawful in the absence of an exemption, or by restricting the ways in which conference members can meaningfully compete on an individual basis for the business of large and small shippers.

10. Because the exemption denies the full benefits of competition, the Division has twice testified before Congress in favor of eliminating the exemption.¹¹ In addition, the American Bar Association's monograph on Federal Statutory Antitrust Exemptions¹² describes why the arguments traditionally asserted to justify the exemption (i.e., ruinous competition due to overcapacity) are dubious. The ABA concludes that the conferences "typically result in inefficiently high rates" and have at least "some ability to inflate price."¹³

4. DOJ Antitrust Enforcement Related to Ocean Shipping Services

11. Conduct that does not satisfy the statutory requirements for the antitrust exemption remains subject to the antitrust laws. The Department of Justice (DOJ) has an ongoing investigation into a single, world-wide conspiracy involving price fixing, bid rigging, and market allocation in international ocean shipping services for roll-on, roll-off cargo to and from the United States and elsewhere. Roll-on, roll-off cargo is non-containerized cargo that can be both rolled onto and off of an ocean-going vessel; examples include new and used cars and trucks and construction and agricultural equipment. Three companies (Kawasaki Kisen Kaisha Ltd., Nippon Yusen Kabushiki Kaisha, and Compañía Sud Americana de Vapores S.A.) have pled guilty, and have been sentenced to pay total fines of over \$136 million, and four corporate executives have pled guilty and been sentenced to prison terms of 14, 15, 18, and 18 months, respectively.¹⁴

12. DOJ has also investigated and prosecuted companies and individual executives for participating in a conspiracy to fix rates and surcharges for freight transported by water between the continental United States and Puerto Rico. The colluding firms, engaged only in domestic shipment (which is not subject to the antitrust exemption), transport a variety of cargo, such as heavy equipment, perishable food items, medicines, and consumer goods, on scheduled ocean voyages between the United States and Puerto Rico.

13. As a result of this ongoing investigation, three companies, including Crowley, Horizon Lines and Seastar, and six individuals, have pleaded guilty or been convicted at trial. The six individuals and three companies that have been sentenced have been ordered to serve a total of more than 16 years in prison and to pay more than \$46 million in criminal fines.¹⁵

¹¹ See James testimony, *supra* n. 5, and Statement of John M. Nannes, Dep. Ass't Atty. Gen., before the House Committee on the Judiciary on H.R. 3138, the Free Market Antitrust Immunity Reform Act of 1999 (March 22, 2000), available at <http://www.justice.gov/atr/public/testimony/4377.htm>. Note that the immunity provided by the Shipping Act does not extend to mergers and acquisitions involving ocean carriers, which remain subject to the antitrust laws.

¹² ABA Section of Antitrust Law, *Federal Statutory Exemptions from Antitrust Law* (2007).

¹³ *Id.*, at 182-83.

¹⁴ See DOJ press releases available at http://www.justice.gov/atr/public/press_releases/2015/index.html.

¹⁵ *Id.*

5. FMC Competition Enforcement Related to Ocean Shipping Services

14. The FMC monitors the competitive impact and commercial conditions of agreements including: conference agreements, rate discussion agreements, operational agreements, and Marine Terminal Operator (MTO) agreements. The FMC adheres to section 6(g) of the 1984 Act and utilizes its threshold – is the agreement in question likely, by a reduction in competition, to produce an unreasonable increase in transportation cost or an unreasonable reduction in transportation service?¹⁶ The FMC continues to monitor agreements utilizing this threshold even after the filing or effective date of an agreement. A few notable agreements recently brought before the FMC include:

- *P3 Network Vessel Sharing Agreement*: Issued Request for Additional Information (RAI), conducted a competitive impact analysis, and developed specific monitoring report requirements for the major operational shipping alliance formed under the P3 Agreement. Note that while the FMC cleared the P3 agreement after an extensive competitive analysis, as a result of not getting regulatory clearance in China, the P3 agreement was withdrawn before any services were implemented and was replaced by the Maersk/MSK Vessel Sharing Agreement.¹⁷
- *G6 Alliance Agreement*: Issued RAI, conducted a competitive impact analysis, and established reporting requirements for the amendment expanding the geographic scope and cooperative services under the G6 Alliance Agreement.¹⁸

15. The Bureau of Enforcement (BOE) is the FMC's prosecutorial arm. Under the 1984 Act or the Foreign Shipping Practices Act, BOE may negotiate settlements and informal compromises of civil penalties, may act as an investigative office in formal fact-finding investigations, and participates as trial counsel in formal FMC proceedings. Targeted violations have included illegal or unfiled agreements among ocean common carriers; unfair or fraudulent practices affecting household goods shippers; and misdescription of cargo.¹⁹ In FY 2014, the FMC collected \$2.4 million in civil penalties for Shipping Act violations.²⁰

¹⁶ 46 U.S.C. § 41307(b)(1).

¹⁷ FMC 2014 Annual Report, supra n. 2, at 10.

¹⁸ Id.

¹⁹ Statement of Mario Cordero, FMC Chairman, before the Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, February 25, 2015, available at <http://www.fmc.gov/chairman-fy16-budget/default.aspx?CategoryId=3&print=y>.

²⁰ Id.