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## Working Party No. 2 on Competition and Regulation

### COMPETITION ISSUES IN LINER SHIPPING

-- Chinese Taipei --

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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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-- Chinese Taipei --

This report is a description of the current status of the liner shipping market and regulatory measures in Chinese Taipei. The competition issues and precedents that the Fair Trade Commission (FTC) has investigated are also presented. To prepare the report, the FTC requested the Ministry of Transportation and Communications (MOTC), the competent authority, to provide necessary information.

**1. Liner Shipping Industry and its Regulatory Framework in Chinese Taipei**

1. Chinese Taipei is surrounded by ocean and over 90% of its import/export trade is carried out through marine transport. Shipping companies in Chinese Taipei provide both liner and tramp services. Liner services mainly ship containers and tramp services ship bulk cargo. The international lines that these services operate cover Asia, the Americas, Europe, Australia and Africa. According to the Review of Maritime Transport 2014 from UNCTAD, the top three liner shipping companies in Chinese Taipei are Evergreen Marine Corp., Yang Ming Marine Transport Corp. and Wan Hai Lines Ltd. They respectively rank No. 4 (1,102,245TEU, accounting for 5.53% of global capacity), No. 12 (561,172TEU, 2.82% of global capacity) and No. 22 (172,572TEU, 0.87% of global capacity). The characteristics of Chinese Taipei liner shipping operators include 1) large scale organizations; 2) cooperation through slot exchange, slot charter and strategic alliances; and 3) conglomerate management, such as Evergreen Marine Corp. and Yang Ming Marine Transport Corp. also engaging in dock management and reinvesting in logistics business.

2. In Chinese Taipei, the FTC is the competition authority while the MOTC oversees the establishment and operations of joint service organizations set up by shipping companies. Currently, the Association of Shipping Services (AOSS) is the only joint service organization formed by local shipping companies in Chinese Taipei. The AOSS was founded in 1984 and currently has 14 member companies. It has been a designated agency<sup>1</sup> according to the Regulations for Materials and Instruments Imported by Maritime Transportation for Governmental Agencies and State-owned Enterprises. It will recommend what materials and equipment the government needs may be shipped by domestic shipping companies at reasonable rates to reduce the cost of such importation. The AOSS also encourages to expand domestic fleets to improve the overall economic development<sup>2</sup>.

3. According to Subparagraph 10 of Article 3 of the Shipping Act, enacted in 1981, an international joint service organization refers to an organization set up permanently or with specific purposes under an agreement achieved on matters related to the operations on the international routes, negotiations of sea freight rates, passenger ticket fees, cargo volume of carriage and charter space and others as to the operation of routes. Meanwhile, that the term “an international shipping agreement” used in Subparagraph 11 of Article 3 means the convention entered into by the international joint associations to regulate such matters as the relationship between the operators, transport operations, costs, intermodal and picking. As the shipping authority, the MOTC imposes the following regulations on joint operations by shipping companies:

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<sup>1</sup> The MOTC gave its consent on February 14, 2005 to recognize the AOSS as a designated agency specified in Article 7 of the Regulations for Materials and Instruments Imported by Maritime Transportation for Governmental Agencies and State-owned Enterprises.

<sup>2</sup> The AOSS was established in 1984 before the FTA was not yet implemented and Article 34 of the Shipping Act was amended. As a result, the AOSS did not have to apply to the FTC for approval of exemption for concerted actions at the time. However, the association did apply on behalf of Yang Ming Marine Transport Corp. and 14 other businesses in 2005, 2008, 2011 and 2014 to the FTC for permission for joint shipment of materials and instruments for government agencies and public enterprises into the country (2005) and subsequently for approval to extend the permission.

1. Application for permission: As set forth in Paragraph 1 of Article 34 of the Shipping Act<sup>3</sup>, any vessel carrier operating in Chinese Taipei, joining or setting up an international joint service organization shall file the Articles of Association, proposal for joint operations and relevant documents with the shipping administration authority (the Maritime and Port Bureau) for ratification through submission to the MOTC for approval on discussion with other authorities (the FTC). And moreover, Paragraph 1 of Article 35 also stipulates that any vessel carrier operating in Chinese Taipei and entering an international shipping agreement shall file name, content and membership list of such international shipping agreement with the shipping administration authority for submission to the MOTC for approval. The filing requirements stated as above also apply to the alteration of such international shipping agreement.
2. Filing of documents for reference: As stated in Paragraph 2 of Article 34 of the Shipping Act, any international organization is organized for discussing freight charges and ticket fares, the fares of the member carriers may be filed by those member carriers authorized by the said organization to the shipping administration authority. Paragraph 2 of Article 35 also prescribes that any international shipping agreement on freight charges and ticket fares, the fare list shall be filed by one of signatory parties to the shipping administration authority. The fare list stated above shall permit the vessel carrier to make decisions on the freight charges and ticket fares at his own discretion.
3. Operational restrictions: According to Article 22 and Paragraph 3 of Article 34 of the Shipping Act, if the fares, rates or charges aforementioned are found improper or disadvantageous to import and export or the development of the shipping industry, the shipping administration authority may order such carriers to make corrections and revisions. The authority may also suspend the effect of the whole or part of such implementations if it deems it necessary.
4. Reference to international conventions: According to Article 60 of the Shipping Act, in case provisions involving international matters are not provided in the present Act, the MOTC may, by reference, undertake to adopt, promulgate and enact the relevant international conventions or agreements and the regulations, directives, standards, recommendations or programs prescribed in the annexes thereto as provisions.

4. In practice, the shipping administration authority is required to consult with the FTC for issues directly involving freight rates or ticket fares set by a standing international organization or non-standing alliance. Regarding the agreement fares, the application only needs to be filed with the shipping administration authority to be forwarded to the MOTC for approval when the parties can make decisions on their sales, marketing, pricing and paperwork independently. If the content of cooperation is limited to slot charter and exchange without involving concerted action, Article 15 of the Regulations for Administrating Vessel Carriers shall apply. Such shipping companies shall register with the shipping administration authority before they can begin freight solicitation and issue bills of lading with the names of collaborating vessels indicated.

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<sup>3</sup> Article 34 of the current Shipping Act was amended on Jan. 30, 2013 and promulgated. Before the amendment, the provisions were set forth in Article 39: "Domestically registered and foreign shipping companies that have joined international joint service organizations and are operating in the country are required to present the names of such international joint service organizations, the contents of the joint service agreements and the lists of members to the maritime administration agency to be forwarded to the MOTC for reference..." Therefore, the regulatory measures are stricter after the amendment while the recognition of the FTC is also required.

## 2. Applicability of Competition Law to International Joint Service Organizations in the Liner Shipping Industry

5. The FTC once assessed whether the General Rate Increase (GRI) and Peak Season Surcharge (PSS) adjustment resolutions achieved on May 1, 2003 by the members of the Transpacific Stabilization Agreement and Canada Transpacific Stabilization Agreement in accordance with their organizational charters were subject to the regulation of the Shipping Act since these organizations had filed with the MOTC for reference according to the Shipping Act. After considering the legislative purposes of the Shipping Act, the characteristics of the marine transport trade, the influence of international joint service organizations on economic efficiency, past policies toward international joint service organizations, and international comity similar to antitrust immunity generally given to shipping conferences, the FTC decided under Article 46 of the Fair Trade Act (FTA), that application of related regulations set forth in the Shipping Act had the precedence. In other words, the FTA may not apply to international joint service agreements and practices exercised in accordance with such agreements if such agreements have been approved by the shipping administration authority according to the Shipping Act.

6. In principle, concerted actions are prohibited by the FTA but they may be permitted under exceptional circumstances. After the amended Shipping Act was promulgated on January 30, 2013, shipping companies operating in Chinese Taipei intend to join or set up international joint service organizations, according to Paragraph 1 of Article 34 of the Shipping Act, they are required to submit the charters of such organizations, the joint operation plans and related documents to the Maritime and Port Bureau to be forwarded to the MOTC for approval after consultation with the FTC. Competition measures often adopted by shipping alliances or joint shipping services include the rate agreement<sup>4</sup>, pooling agreement<sup>5</sup>, deferred rebate system<sup>6</sup>, contract rate system<sup>7</sup>, fighting ship<sup>8</sup>, capacity control<sup>9</sup>, slot charter<sup>10</sup>,

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<sup>4</sup> Freight rate agreement: When the members of a shipping alliance establish or consult to establish unified charging standards or freight rates and create a freight rate table accordingly, it is an act of price agreement.

<sup>5</sup> Pooling agreement: Two or more shipping companies establish the agreement to operate on the same route and assign vessels to run joint operations at unified freight rates. They share the gains, losses and expenses according to specific formulas. It can be divided into cargo sharing, profit sharing, cargo and profit sharing, and tonnage sharing.

<sup>6</sup> Deferred rebate system: A shipper signs an agreement to give all cargo to a shipping conference for shipment for a certain period (usually 4 to 6 months). When the shipper gives cargo to the same conference for shipment again some time later (within 4 to 6 months), the conference will return a certain percentage of the freight charges to the shipper. However, if the shipper violates the agreement, the shipping conference can confiscate all the rebates accumulated. Therefore, restricted by the agreement, the shipper has no choice but to give all of its cargo to the same conference for shipment in order not to lose the huge rebates. As a result, shipping conferences can raise freight rates without losing their sources of cargo and shipping companies not belonging to any conference will find it difficult to compete.

<sup>7</sup> Contract rate system: It is also called the dual-rate system or exclusive patronage agreement. A shipper signs a contract with a shipping company and makes the commitment to give all the cargo under its control in all the ports where the conference operates to shipping companies belonging to the conference for shipment in return for lower freight rates and the guarantee of no freight rate raises within a certain period. With shippers that have not signed such a contract, the conference will charge normal freight rates. If the shipper gives some of its cargo to a non-conference vessel for shipment when the contract is still valid, it will be required to pay a fine of a certain amount for breach of contract or dead freight as compensation. However, if all the member companies are unable to provide enough shipping space, the shipper is allowed to give cargo to non-conference vessels for shipment provided that the practice is approved by the chair or representative of the conference in advance.

slot exchange<sup>11</sup>, etc. Except for the slot charter and slot exchange<sup>12</sup>, the others are likely to constitute “concerted actions” under Article 14 of the FTA<sup>13</sup>.

7. The FTC may approve the above-mentioned concerted actions according to Article 15 (application for exemptions) and Article 16 (conditional approval of concerted action) of the FTA. Otherwise the FTC may under Article 40, order the concerned parties to stop or correct the conduct or take necessary remedial measures within a given period and impose an administrative fine of no less than NT\$100,000 but no more than NT\$50 million. Meanwhile, if a violation described above is deemed critical, the FTC may impose an administrative fine of up to 10% of the concerned enterprise’s total sales in the previous fiscal year. At the same time, as stipulated in Article 34 of the FTA, if the FTC acts according to Paragraph 1 of Article 40 of the FTA and orders the enterprise in question to stop or correct its conduct or take necessary remedial measures within a given period but the enterprise fails to stop or correct its conduct or take necessary remedial measures within the period given or engages in the same unlawful practice again after stopping the conduct, the offender may be sentenced to no more than three years of a fixed term of imprisonment, detention, detention convertible into a fine or detention with a fine of no more than NT\$100 million imposed simultaneously.

8. Since the Shipping Act was amended on January 30, 2013, only the top three shipping companies in the world, namely, Maersk Line, Mediterranean Shipping Company and CMA CGM made inquiries with the Maritime and Port Bureau between June and July of 2014 about the application for setting up an international joint service organization (called the P3 Alliance). However, before filing the application, the

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<sup>8</sup> Fighting ship: When a shipping conference encounters fierce competition from shipping companies outside the conference, the conference assigns a number of vessels of similar tonnage and performance to solicit cargo at lower freight rates on the same route, based on the same schedule and using the same ports as the competitors to force them to withdraw from the route as a result of failing to solicit enough cargo, lacking profit and being unable to cope with the loss.

<sup>9</sup> Capacity control: When the member companies of a conference have excessive shipping space on a certain route and the sources of cargo are inadequate, they consult to adjust the supply of and demand for shipping space and define the maximum shipping space use ratio for each member to reduce the supply of shipping space, prevent price-cutting competition and raise freight rates.

<sup>10</sup> Slot charter: Two or more companies operating similar lines or different lines assign shipping space through a charter contract to expand each other’s service areas and promote service standards. However, each company is responsible for its own cargo solicitation and vessel operation.

<sup>11</sup> Slot exchange: A shipping company exchanges its shipping space for the shipping space of another shipping company to increase the number of voyages, upgrade service quality, reduce operating costs, improve shipping space utilization rates, and create opportunities to provide shipping services in other countries. Each company solicits cargo and issues bills of lading on its own.

<sup>12</sup> When a shipping company jointly operates with others as specified in Article 15 of the Regulations for Adminstrating Vessel Carriers through capacity control or slot charter, under the premise that related regulations have not been amended, the FTC will in principle adopt its opinion as stated in Kung-Yi-Tzu Letter No. 1001261501 dated January 2, 2012, of which the MOTC was given a copy. If capacity control and slot charter are practices permissible according to the Shipping Act and related regulations, the FTA shall not apply as prescribed in Article 46. However, practices that have not been approved are excluded.

<sup>13</sup> According to Article 14 of the FTA, “The term “concerted action” means that competing enterprises at the same production and/or marketing stage, by means of contract, agreement or any other form of mutual understanding, jointly determine the price, quantity, technology, products, facilities, trading counterparts, or trading territory with respect to goods or services, or any other behavior that restricts each other’s business activities, resulting in an impact on the market function with respect to production, trade in goods or supply and demand services.”

plan was cancelled because China prohibited the organization of the P3 Alliance. In other words, no shipping companies have applied to the FTC for approval to join or set up international joint service organizations since then. As for shipping alliances that have filed with Chinese Taipei for reference in the past according to the Shipping Act, whether operating under the title of “agreement” or “conference,” they all emphasized that the intention was to enhance use of space and benefit one another; observance of the freight rate agreement was voluntary, not compulsory. Among the international shipping agreements that shipping companies in Chinese Taipei have joined, the most well-known is CKYHE to which Yang Ming Marine Transport Corp. and Evergreen Marine Corp. are signatories. As indicated in the statistics established by the international journal *Alphaliner* in July 2014, the shipping capacity of CKYHE in the Far East-Northern Europe routes accounted for 24% of the entire world, lower than the 33.2% of 2M (Maersk and MSC) but slightly higher than the 23.5% of G6 (Hapag-Lloyd, APL, MOL, HHM, NYK and OOCL).

**3. Precedents of joint service organizations applying for exceptional permission for concerted actions: The AOSS applied on behalf of Yang Ming Marine Transport Corp. and 14 other businesses for permission to conduct joint shipment to import materials and equipment for government agencies and public enterprises (2005) and subsequent applications for extension of the permission (2008, 2011 and 2014).**

9. As set forth in Article 9 of the Regulations for Materials and Instruments Imported by Maritime Transportation for Governmental Agencies and State-owned Enterprises, when concerted actions are involved in the shipping service provided, domestic shipping companies are required to apply to the FTC for permission in advance. Such application may be conducted by a designated agency. Therefore, the AOSS which represented Yang Ming Marine Transport Corp. and 14 other businesses, applied for permission to conduct the joint shipment of imported materials and instruments for government agencies and public enterprises. After reviewing the application, the FTC decided to approve the concerted action for three years with conditions attached. So far, the AOSS has applied for extension three times.

10. The concerted action of Yang Ming Marine Transport Corp. and 14 other businesses to conduct joint shipments to import materials and instruments for government agencies and public enterprises met the type described in Subparagraph 5, Paragraph 1 of Article 15 of the FTA. It is that “joint acts in regard to the importation of foreign goods, or services for the purpose of strengthening trade may be approved.” However, as stated in Paragraph 1 of Article 15, exceptional permission may be granted only when a concerted action is “beneficial to the economy as a whole and in the public interest.” After assessing the requirements in the overall economic development, the significance of establishing domestic fleets up to a certain scale in case transportation of military provisions would be needed during wartime, international economic and trade tendencies, and the vessels of any single domestically registered shipping business lacking the capacity to provide shipping service procured by government agencies and enterprises, the FTC decided that joint shipment was necessary. In addition, the FTC also took into consideration that joint shipment could enable the applicants to reduce their operating, transportation and port expenses as well as make more efficient use of their vessels to provide government agencies and enterprises with stable marine transport service. It would be beneficial to the overall economy. Moreover, the MOTC also concurred that joint shipments would help achieve the policy targets of increasing the sizes of domestically registered fleets and stabilizing commodity prices.

11. However, to avoid the creation of inappropriate restrictions to keep other domestically registered shipping companies that met the qualifications in the said regulations from joining the concerted action and also to prevent the applicants from abusing the advantages obtained with the concerted action permission to carry out unfair competition practices, the FTC therefore imposed three conditions: 1) the applicants may not refuse other domestically registered shipping companies that comply with related provisions in the Regulations for Materials and Instruments Imported by Maritime Transportation for Governmental

Agencies and State-owned Enterprises to join the concerted action;2)the applicants may not exploit the market status they obtain with the permission to obstruct fair competition from other enterprises or to engage in any market status-abusing conduct, and 3)the applicants are required to present the cargo weight ratios to the FTC for reference to facilitate the FTC's supervision of the concerted action.

#### **4. Investigations and Market Research or Reports in Relation to the Liner Shipping Industry**

12. In 2007, the Institute of Transportation of Chinese Taipei conducted its own study on strategic alliances in liner shipping and reached the following conclusions:

1. In order to stay in business, shipping companies continue to increase their global market share and expand their services for shippers. Liner shipping companies, on the other hand, acquire larger vessels to build up the scale of their operations to reduce their unit transportation cost. With limited demand for transport service in the market, liner shipping companies therefore choose to operate through strategic alliances to avoid vicious competition resulting from transport service supply being larger than demand.
2. Joint service agreements between shipping lines are by nature contracts established according to private law. Contracting parties have the liberty to decide the contents of the contract. However, the contents of a contract cannot be without standards and limitations. They are subject to imperative or prohibitive provisions and public order and morals as well as formality requirement. Slot charter and slot exchange practices do not violate the concerted action regulations in the FTA. Capacity control, however, is control of supply to stabilize freight rates and the result can be that shippers have to shoulder the negative costs derived from shipping companies' overexpansion and excessive production capacity. It is obviously in violation of the FTA.
3. Joint service agreements between shipping lines are defined as contracts established according to private law. Yet, they are in fact international contracts; therefore, the provisions therein are bound to involve the application of international maritime conventions yet the applicability of international maritime conventions in regions where the shipping routes are covered by joint service agreements is debatable.
4. How international maritime conventions can be adopted in domestic laws and enforced also involves coordination between international and domestic laws. This is another issue to be further discussion.

## **5. Conclusion**

13. After the Shipping Act was amended in 2013, marine transport operators need the approval of the competition authority, the FTC, to join or set up international joint service organizations. The regulations are stricter than before the amendment. So far, no such applications have been filed with the FTC. Nevertheless, with the trend of international strategic alliances between liner shipping companies in recent years, Evergreen Marine Corp. of Chinese Taipei decided to change its policy of not joining any alliance and started to cooperate with. Following the aforesaid trend, competition between marine transport operators has been more and more intense and pressure from competition will eventually become overwhelming. Under such circumstances, strategic alliances, agreements and cooperation between shipping companies will grow more diverse and relations can only get tighter. Meanwhile, intervention from the competition authority will become more frequent to ascertain whether these new agreements or modes of cooperation are in compliance with competition law. Hence, the FTC does not rule out the possibility of conducting studies on the development of strategic alliances in the liner shipping industry, their modes of operation and the positive and negative effects on competition. The FTC will also review the shipping regulations and policies, the market structure, competition situation, as well as economic and social changes in order to promote competition policy at the right time. At the same time, the FTC will also take more active measures to look into competition practices in the market, including business mergers, concerted actions, participation in and establishment of international joint service organizations, and even competition issues with regard to whether the international shipping agreements filed with the MOTC for reference are likely to give rise to anti-competition effects.