

“Trends in the Competition Law Exemption Systems on International Shipping and International Air Services in Foreign Countries and Implications for Japan” (Abstract)

In this report, we studied trends in foreign countries with respect to the competition law exemption systems (hereinafter “exemption system”) in relation to international shipping and international air services in order to get some suggestions on how Japan should build an appropriate system. In addition, we suggest the view that maintenance of exemption system for international shipping in Japan is not deemed necessary and Japan’s exemption system for international shipping should be abolished. We also suggest the view that maintenance of exemption system for Japan’s international air services is unjustifiable.

1. Trends in exemption systems relating to international shipping in the foreign countries we examined

(1) U.S.

Under the business law (Admiralty Law), agreements between shipping companies for international cargo liner services are subject to exemption system (registration is required). However, with respect to shipping conferences (arrangement of freight rates), there are mechanisms in place to maintain and promote competition between the parties to agreements.

(2) EU

In the EU, liner conference agreements used to be block-exempted until 2008 under Regulation 4056/86, which provided both substantive and procedural provisions applicable to maritime transport. After the repeal of the above Regulation, maritime transport is fully subject to Regulation 1/2003. Consortia, on the other hand, are still block-exempted under Regulation 906/2009 with certain conditions (non-determination of freight levels and capacity, a market share of less than 30% etc.). Regulation 906/2009, prolonged by Regulation 697/2014, shall apply until 2020.

(3) South Korea

Under the business law (Maritime Law), agreements between shipping companies for international cargo liner services and cargo tramper services are subject to exemption system (registration is required); however, with respect to cargo tramper services, the implementation of contracts and concerted action in relation to freight rates are prohibited.

(4) Australia

Agreements between shipping companies for international cargo liner services are subject to exemption system (registration is required) in accordance with the provisions of competition law (Part X of the Competition and Consumer Act). However, the exemption system can be applied only if the shipping company concludes negotiations with shippers upon request.

As of 2015, a proposal to abolish the current system and to apply the general provisions of the Competition and Consumer Act with amendment to the field of international cargo liner services, in principle, is being made by the competition policy review panel chaired by Professor Ian Harper and the government is to examine further the options that it can take under the amended law.

(5) New Zealand

There are exemption provisions in both the competition law (Commerce Act) and business law (Maritime Transport Act). International shipping services regardless of whether liner or tramp services are widely subject to exemption system. However, under the Maritime Transport Act, shipping companies are obligated to hold negotiations with shippers in advance when changing contract conditions. Currently, a bill to amend the law to abolish the exemption system is being deliberated in Parliament.

(6) Singapore

Agreements between shipping companies for international cargo liner services are exempted under a system of block exemption under the Competition Act. However, this is the exemption with a five-year time limit and agreements restricting the setting of rates through individual negotiations with shippers are prohibited.

(7) Malaysia

Discussion agreements or consortia for international cargo liner services are exempted under a system of block exemption under the Competition Act. However, this is the exemption with a three-year time limit, and a condition of exemption is that it shall not preclude the setting of rates through individual negotiations with shippers.

2. Trends in systems of exemption relating to international air services in the foreign countries that we examined

(1) U.S.

There is exemption system (approval required) in accordance with the business law (Federal Aviation Act). Under the exemption system provided for in said law, the approving transport authorities review the draft of the JV agreement (comprehensive cooperation agreement accompanied by income pooling, determination of joint rates, and adjustment of service schedule, etc.); the review is conducted from the same perspective as antitrust laws.

(2) EU

Multiple systems of block exemption relating to international aviation agreements used to exist for each type of agreement; the system of block exemption however was abolished across-the-board by 2007. The European Commission currently makes assessments and judgments with respect to JV agreements in a way that maximizes user convenience from the viewpoint of competition law.

(3) South Korea

There is exemption system (approval is required) in accordance with the business law (Aviation Act). Under the exemption system provided for in said law, the approving transport authorities review the agreement draft; however, in the case of JV agreements, consultation with the Korea Fair Trade Commission is required, and essentially it cannot be said that the exemption system is utilized.

3 Suggestions for Japan

(1) International shipping

In foreign countries, broad exemption of international shipping services from application of antitrust and competition laws is not necessarily recognized as essential any more, and if anything the application of antitrust and competition laws to tramp services can be described as becoming predominant. Also with respect to liner services, according to economic analysis, shipping conferences are not recognized as being necessary for business execution.

Also in Japan, shipping conferences are not recognized as necessary for business execution in the case of tramp services. Likewise, in the case of liner services, shipping conferences and discussion agreements (preparation of freight rate guidelines) are not recognized as necessary for business operation.

Also in the case of consortia, anticompetitive effects are not always existent and thus should be examined on a case by case basis, and therefore the application of the antimonopoly law is unlikely to jeopardize the formation and operation of the procompetitive consortia.

Given these circumstances, it is our view that maintenance of the exemption system is not deemed necessary and the system should be abolished.

(2) International air services

In the field of international air services, the EU has already abolished exemption systems, but the US and South Korea still have exemption systems. However, in light of foreign investment regulations, etc. international joint ventures that benefit from these systems can in effect be described as business combinations between a domestic airline and an international airline.

Given that under antitrust and competition laws, business combinations between domestic airlines are subject to business combination regulations by the relevant country's competition authorities, during business combinations reviews, international aviation systems and frameworks, efficiency, etc. should also be taken into consideration.

In light of these circumstances, it is perhaps appropriate to assess international joint ventures in accordance with the judgment framework or standards that prevail in business combination regulations under antitrust and competition laws, and maintenance of the exemption system is considered unjustifiable.