

# Review of the System for Exemption from the Antimonopoly Act for International Ocean Shipping (Summary of the Report)

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Japan Fair Trade Commission

## 1. Purpose of Review (Part 1 in the Report)

Given the system of exemption from the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947, “AMA”) should be limited to the minimum extent necessary because the AMA is a general rule in the market economy, it is important to consistently review the exemption system in response to changes in the economic conditions, etc.

Although the system of exemption from the AMA for international ocean shipping was originally established based on the Marine Transportation Act (Act No. 187 of 1949), the exemption system was mainly reviewed three times in 1999, 2006, and 2010 after it was first established in 1949. As a result of these reviews, it was decided that the exemption system would remain in effect mainly on the grounds of (1) the international consistency of the exemption system, and (2) the protection of the interests of shippers.

Considering that over five years have passed since the previous review and the Japan Fair Trade Commission (“JFTC”) found that the function of conferences almost disappeared under the investigation of the case concerning international ocean shipping services for automobiles<sup>1</sup>. In light of these developments, the JFTC reviewed whether the reasons for maintaining the system of exemption from the AMA are still valid today by conducting a fact-finding survey on the actual conditions of international ocean shipping, as well as the actual state of exemption from the AMA for international ocean shipping.

## 2. Actual Conditions of International Ocean Shipping (Part 3 in the Report)

International ocean shipping has become an essential transportation means for the foreign trade of Japan. There are two types of international ocean shipping, i.e., liner shipping and tramp shipping, and these are defined based on the operational form of ships. International ocean shipping can also be divided into cargo shipping and passenger shipping. Most of the agreements regarded as exempt from the AMA are those related to cargo shipping. The following section will discuss cargo shipping in greater detail.

### (1) Liner Shipping

Although container ships and conventional cargo ships, etc. are used for liner shipping, the majority of ships used for liner shipping are container ships.

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<sup>1</sup> JFTC, “Cease and Desist Orders and Surcharge Payment Orders against International Ocean Shipping Companies” (March 18, 2014)  
<http://www.jftc.go.jp/en/pressreleases/yearly-2014/March/140318.html>

There are two types of liner shipping contract: a fixed-term contract, in which contract terms such as freight rates are decided by specifying a period of time, and a spot contract, in which contract terms such as freight rates only for one passage are decided. In practice, shippers make a fixed-term contract for six months or one year with shipping companies for most of their cargo, and most of these shippers do not review base rates with the shipping companies during the fixed-term period.

In regards to the criteria for selecting shipping companies by shippers, many placed an emphasis on the following items (by order of priority): level of freight rates, service schedules/frequencies, and the securing of space.

## (2) Tramp Shipping

Pure car carriers, dry bulk carriers, tankers, and LNG carriers, etc. are used in tramp shipping, with different ships used for different types of cargo. However, the majority of the notices to the JFTC concerning agreements on tramps are those for agreements on pure car carriers.

Transportation contracts for pure car carriers are categorized into fixed-term contracts and spot contracts, just as they are for liners. In practice, shippers make fixed-term contracts for one year or longer with shipping companies for most of the transportation volumes and most of these shippers do not review base rates with the shipping companies during the fixed-term period.

In regards to the criteria for selecting shipping companies by shippers, many placed an emphasis on the following items (by order of priority): service schedules/frequencies, level of freight rates, and the securing of space.

## **3. Actual State of the Exemption from the AMA for International Ocean Shipping (Part 4 in the Report)**

In fiscal year 2014, the JFTC received 212 notices concerning international ocean shipping agreements. These agreements are broadly divided into four categories: conferences, discussion agreements, consortia, and car carrier agreements.

### (1) Conferences

A conference is a cooperation agreement between shipping companies that is accompanied by the arrangement of freight rates. Conferences are primarily for liner shipping and tramp shipping (limited to pure car carriers). The main function of conferences is to formulate binding tariffs that define freight rates, etc. based on ocean routes and container types. However, neither the percentage of shippers presented with base rates defined by the tariffs decided by a conference nor the percentage of those who think it better to have a conference is high.

### (2) Discussion Agreements

A discussion agreement is a cooperation agreement between shipping companies that is accompanied by discussions between the shipping companies concerning the appropriate level

of freight rates, etc. This type of agreement is for liner shipping. The main function of discussion agreements is to formulate unbinding freight rate guidelines that present a general rate increase (GRI) for the base rates, etc. A general rate increase (rate restoration) is recommended to the member shipping companies. However, neither the percentage of shippers presented with general rate increases defined by the freight rate guidelines formulated by a discussion agreement nor the percentage of those who think it better to have a discussion agreement is high.

### (3) Consortia

A consortium is a cooperation agreement between shipping companies in their shipping services that is not accompanied by a decision on the freight rates and revenue pool. This type of agreement is also for liner shipping. The main functions of the consortium are to provide a liner shipping services in the joint operation based on the exchange or chartering of transportation space or slots on vessels. Sometimes adjustments are made simultaneously to shipping service schedules, the number of shipping services, and ocean routes. Unlike conferences and discussion agreements, the percentage of those who think it better to have a consortium is high.

### (4) Car Carrier Agreements

A car carrier agreement is a cooperation agreement between shipping companies in their shipping services that is not accompanied by a decision on the freight rates. This type of agreement is for tramper shipping (limited to pure car carriers). The main function of car carrier agreements is to implement joint operation based on adjusted shipping service schedules (vessel operation in rotation). Sometimes exchange or chartering of transportation space or slots on vessels are made. Unlike conferences and discussion agreements, the percentage of those who think it better to have a car carrier agreement is high.

## **4. Necessity for the System of Exemption from the AMA (Part 5 in the Report)**

The system of exemption from the AMA is an exceptional system in the market economy, and should be limited to the minimum extent necessary. Taking this fact into consideration, an examination was conducted on the necessity for such a system from the perspective of whether the international consistency of the exemption system and the protection of shippers' interests, which have been cited as the main reasons for maintaining this system, are still valid. An examination was also conducted to determine whether consortia and car carrier agreements, which few shippers consider not to be necessary and not a few shippers consider to be necessary, would no longer be able to be implemented because in principle these agreements will come into question under the AMA if the exemption system is abolished.

### (1) International Consistency of the Exemption System

As of this time, the scopes of agreements that are regarded as exempt from the AMA in Japan, the antitrust laws in the United States, and the EU competition law in the EU (“exemption from the competition laws”) are different. While conferences, discussion agreements, consortia, and car carrier agreements are all regarded as exempt from the AMA in Japan, conferences on liner shipping are regarded as partly exempt from antitrust laws and any agreements on trampers are not regarded as exempt from antitrust laws in the United States. In addition, any conferences and discussion agreements on liner shipping and any agreements on trampers are not regarded as exempt from the EU competition law in the EU.

Therefore, it is not necessary to make these agreements exempt from the AMA on the grounds of the international consistency of the exemption system. The reasons for this are that the existence and scope of the exemption from the competition laws are different for liners in the United States and the EU, and that agreements on trampers are not regarded as the exemption from the competition laws in both the United States and the EU.

### (2) Protection of Shippers’ Interests

Shippers place greater emphasis on the level of freight rates than on their stability. In addition, shippers who wish for stable freight rates address this issue by signing a fixed-term contract. Therefore, it is not essential to keep the stability of freight rates by conferences and discussion agreements. Also, as it is difficult to claim that conferences and discussion agreements work well to stabilize freight rates because tariffs in conferences and freight rate guidelines in discussion agreements hardly have a significant impact on freight rates that are actually determined.

Therefore, it is not necessary to make conferences and discussion agreements exempt from the AMA on the grounds of the shippers’ interests.

### (3) Implementation of Consortia and Car carrier agreements

In consortia and car carrier agreements, a joint operation is implemented by exchange or chartering the transportation space or slots and adjusting the shipping service schedules, the number of shipping services, and ocean routes, etc.

The cooperation or coordination on transportation space is basically considered to pose little problem under the AMA if it is conducted within the rationally necessary scope for increasing the convenience of shippers unless it restricts quantities of services provided by shipping companies. This is because competition between shipping companies for shippers is highly likely to be maintained. Therefore, it is not necessary to make consortia and car carrier agreements exempt from the AMA in order to continue to cooperation or coordination transportation space or slots.

The issue of whether adjusting shipping service schedules, the number of shipping services, and ocean routes comes into question under the AMA is considered to vary according to the specific conducts performed and the competition situation in the market. However, it is essentially unlikely that the conduct of adjustment will come into question under the AMA unless

it restricts means of competition as a whole. In general, this means that the interests of shippers are not unfairly impaired, and that it is possible to cope with the issue of securing legal stability through the formulation of guidelines, etc. by the JFTC. Thus, it is not necessary to make consortia and car carrier agreements exempt from the AMA.

#### (4) Conclusion

Conferences, discussion agreements, consortia and car carrier agreements are the main agreements that are regarded as exempt from the AMA. It is not necessary to make these agreements exempt from the AMA. Therefore, it is considered to be no reason for maintaining the system of exemption from the AMA for international ocean shipping.

### **5. The JFTC's Future Actions**

In regards to the revision of the system of exemption from the AMA for international ocean shipping, the Ministry of Land, Infrastructure, Transport and Tourism ("MLIT") says that it "will review the system of exemption from the AMA for international ocean shipping in discussions with the JFTC during fiscal year 2015<sup>2</sup>." The JFTC will work with MLIT to discuss this exemption system, taking into account this report, and thereby ensure that competition in international ocean shipping is not restricted and that the Japanese economy as a whole does not suffer any negative effects.

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<sup>2</sup> MLIT, "The revision of the system for exemption from the Antimonopoly Act for international ocean shipping" (June 17, 2011)