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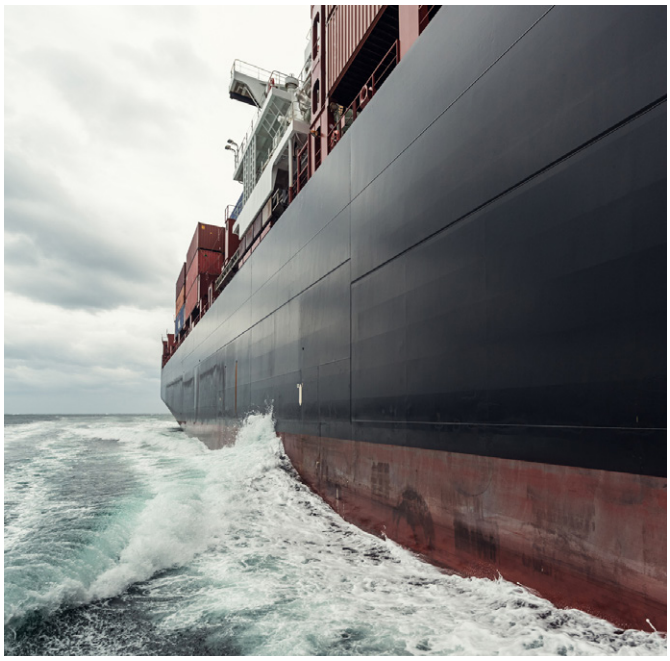
Shipping Antitrust in Focus – The Federal Maritime Commission Charts a Course Following the EU Commission's Revocation of the Antitrust Exemption for Liner Services

We recently reported that the European Commission decided to end a rule exempting liner shipping services from certain EU antitrust rules, by letting the Consortia Block Exemption Regulation (CBER) expire on April 25, 2024. With the Biden administration's stepped-up antitrust enforcement focus, the EU Commission decision raises an interesting question – what will Congress and the Federal Maritime Commission (FMC) do in response?

The Shipping Act of 1984 (Shipping Act) contains an antitrust exemption that applies to agreements among ocean carriers in US/foreign trade or with or among marine terminal operators serving those carriers.[1] In the US, agreements among competitors to set prices are illegal under antitrust law.[2] The Shipping Act's antitrust exemption allows shippers significant power to coordinate rates, including via rate bureaus or organized cartels, so long as they register the rate agreements with the FMC. The exemption also gives shippers immunity from private antitrust litigation based on conduct prohibited by the Act.[3] However, unregistered agreements can still violate federal antitrust law and are subject to a private complaint process before the FMC. Successful plaintiffs before the FMC can receive damages, including double damages in certain circumstances.

Additionally, the antitrust exemption is limited in scope. The exemption is restricted, in part, to agreements involving "foreign inland segments" and does not apply to agreements that have "a direct, substantial, and reasonably foreseeable effect" on US commerce. [4] The exemption also does not immunize shippers from other anticompetitive conduct, including monopolistic behavior.[5] Nor does the exemption immunize shippers from criminal liability. Indeed, in 2005, the Fourth Circuit found a shipping cartel involving local European and oceanic shipping services criminally liable under antitrust law because the companies' collusive effort was "aimed at the entire through transportation market, rather than just the foreign inland segment."[6] Courts are at odds, however, over the extent of the exemption.



The Ninth Circuit previously found no criminal liability for an agreement among shippers regarding moving goods in a foreign country, even though the goods were eventually bound for the US.[7]

A new bill introduced in February 2022, the Ocean Shipping Antitrust Enforcement Act (OSAEA) would remove the Shipping Act's antitrust exemption.[8] If passed, the bill would impact rate agreements, pooling agreements and shipping route allocations. As of November 2022, the bill is still pending in committee. While the shipping antitrust exemption currently remains in place, there are at least some congressional interests that wish to revoke it.

While preserving the antitrust exemption, congress has already made some significant changes to US shipping law by passing the Ocean Shipping Reform Act of 2022 (OSRA 2022). Under OSRA 2022, the FMC was granted new authority to regulate ocean carrier practices. Coupled with additional regulatory power, in 2022, the FMC and the US Department of Justice signed a memorandum of understanding to better coordinate antitrust enforcement. Against this background, the FMC is considering regulatory changes that have garnered significant industry attention.

1 46 U.S.C.§§§ 40307; 40102(6), (14) 40301(a)(b).
2 Sherman Act, § 1, as amended, 15 U.S.C. § 1 ("Every contract, combination ..., or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").
3 See *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 81 (3d Cir. 2017), as amended (Jan. 25, 2017) (citing 46 U.S.C. § 40307(d)) ("A party injured by activities occurring under such an unfiled, and hence not effective, agreement may not obtain Clayton Act relief.").
4 46 U.S.C.§ 40307(a)(4)–(5).
5 The Shipping Act explicitly prohibits shippers from using "a vessel ... for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade." 46 U.S.C. § 41104(a)(6). The act also prohibits unreasonable refusals to deal, and discriminatory practices. 46 U.S.C. §§ 41104(a)(10), 41102(d).
6 *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 510 (4th Cir. 2005).
7 *United States v. Tucor Int'l, Inc.*, 189 F.3d 834, 836 (9th Cir. 1999).
8 *See* H.R.6864 – Ocean Shipping Antitrust Enforcement Act, 117th Congress (2021-2022).

OSRA prohibits ocean carriers from unreasonably refusing to deal or negotiate with shippers with respect to vessel space accommodations. The proposed rulemaking seeks to define the phrase "unreasonable refusal to deal or negotiate with respect to vessel space accommodations," which would be used to determine whether an OSRA violation has occurred. The original rule was proposed in September 2022.[9] After receiving numerous comments from various trade associations and federal agencies, the FMC issued a notice of supplemental rulemaking that seeks to refine what factors it should use to set the "unreasonableness" standard[10], which the FMC acknowledges is inherently difficult to define. Whenever the final rule is issued, it is likely that there will be significant litigation over its application.

How the FMC will define unreasonable refusal to deal requires a balancing act to craft a rule that implements congressional intent to ensure that ocean carriers comply with US shipping laws while not creating a rule that is too commercially restrictive. As shipping is a global industry, it remains to be seen whether the recent EU Commission decision to end the antitrust exemption may influence the FMC's final rule. Given the potential impact of the FMC's action, stakeholders should strive to ensure their concerns are heard by the FMC and likewise review their FMC compliance strategy.

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9 *See* 87 FR 57674-01, 2022 WL 4356068(F.R.).
10 *See* 88 FR 38789-01, 2023 WL 3973368(F.R.).

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