

Note

Ministry's move to exempt shipping sector from the lens of Competition Act



ACS Nidhi Ladha

nidhiladha@vinodkothari.com

Vinod Kothari & Company

September 29, 2012

Check at:

<http://india-financing.com/staff-publications.html>
for more write ups.

Copyright:

This write up is the property of Vinod Kothari & Company and no part of it can be copied, reproduced or distributed in any manner.

Disclaimer:

This write up is intended to initiate academic debate on a pertinent question. It is not intended to be a professional advice and should not be relied upon for real life facts.

Note

The Competition Act 2002 [as amended by Competition (Amendment) Act, 2007] (the “Act”) overrides the erstwhile MRTP Act and codifies a present-day competition law in India. The Act plays a twin role of making void all anti-competitive agreements and regulating combinations fulfilling the conditions specified in Section 5 of the Act. One cannot abuse its dominant position which affects the competitions in India. Previously, the provisions relating to regulation of combinations were not notified by the Government and the same has recently been enforced with effect from March 4, 2011.

Section 5 of the Act prescribes the conditions when an arrangement/agreement shall be treated as ‘combination’ under the Act and accordingly, the parties are to fulfill their obligations which inter-alia includes notifying the Competition Commission constituted under the Act (the “Commission”) and obtaining prior approval in some cases. Even after much opposition, the ministry had notified the merger regulations under the Act in 2011, however, keeping it open to exempt industries from time to time as and when required.

The first move of Ministry in granting relaxation to specific industries has already been affected and the first candidate is the shipping industry! Recently in the late September of 2012, by exercising its power under Section 54 of the Act, the Ministry has put in place the draft guidelines¹ exempting the Shipping Industry from the applicability of the provisions of the Act for one year (“Draft Guidelines”) and has invited public comments.

Features of Draft Guidelines

If one looks at the agreements that ship liners enter into, they are illegal under section 3 of the Act. The agreements, which include fixing freight rates and other charges like terminal handling charges, bunker adjustment factors and currency adjustment factors, actually fall under price fixing cartels, which are per se illegal under the Act.

As per the Draft Guidelines, the Vessel Sharing Agreement (VSA) and Voluntary Discussions Agreement (VDA) (collectively referred to as the “Agreements”) as entered by the Shipping Industry, whether Indian or Foreign parties, shall be exempted from the application of the provisions of the Act for a period of 1 year from the date of the publication of Guidelines in the Gazette of India. Though the

¹ http://www.mca.gov.in/Ministry/pdf/draft_notification_19_sept_2012.pdf

Note

intimation to or approval of the Commission shall be relaxed, all relevant documents pertaining to the Agreements shall be required to be submitted with Directorate General of Shipping (DG-Shipping).

After Effects of the Guidelines

It seems that the Ministry will be issuing the final Guidelines also on trial basis as the Draft Guidelines contain a provision relating to making further amendments or withdrawal of exemption after seeing the performance/effects of such agreements during the year of relaxation. If the exempted Agreements would be affecting the competition adversely, such exemption will be withdrawn after due consultation with Directorate General of Shipping (DG-Shipping).

Our Analysis

The relaxation to shipping industry is surely a welcome step of Ministry. The Ministry has given a time till October 3, 2012 to submit the views/comments on the Draft Guidelines after which the Guidelines are expected to come soon in the Official Gazette. As insisted by the Reserve Bank of India, the Commission had earlier sought to exempt the banking sector from the purview of the Act. The exemption to banking companies from the purview of Competition Act was approved by Lok Sabha in March, 2012 (the same was inter-alia proposed in Banking Regulations (Amendment) Act, 2011. However, the approval from Parliamentary Panel is yet to be received. The insurance and telecom sectors are also likely to demand a similar exception after the grant of exemption to shipping industry. All in all, we have to wait and watch the result of such kind of Ministry's 'wait-and-watch' behavior!

Other relevant articles that may interest you

See our presentation on Competition Act-Effect on Business Combination at <http://india-financing.com/Competition Act Effect on Business combinations.pdf>