

INDIAN SHIPPING EXEMPTION FROM COMPETITION POLICY: COMPARISON AND CRITICISM

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ABSTRACT

Changing technologies, marketplaces, and even trends in anti-competitive practices have all presented challenges to antitrust enforcement - Alan Stuart Franken.¹

Liner Shipping Agreements are exempted from the purview of competition policy in many jurisdictions around the world with the objective to boost the economy and maintain price stability. In India, the Ministry of Corporate Affairs issued a notification in September 2012 to exempt Liner Shipping Agreements from the ambit of the Competition Act, 2002 and further extended the exemption with a notification in the year 2018. The notification clearly is of a bona fide nature but is ambiguous as to the implementation. Upon comparison with countries having a better-established shipping industry than India, the lacunae in these exemptions are evident.

This paper aims into analyzing the advantages and disadvantages of the exemptions granted and how the regulations are imposed on the shipping industry in India. The paper will also discuss the issues relating to the shipping agreements. Further, the paper provides a comparison of the exemption policies of few well established foreign jurisdictions and suggests how Indian policy can be implemented efficiently.

Keywords: *liner shipping agreements, shipping exemption, competition policy, shipping industry*

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1. INTRODUCTION

The primary objective of competition policy is to promote smooth and pro-competitive markets.² The competition law of any country tries to inhibit any private players which are obstructing the market. One of such inhibitions is through avoiding anti-competitive agreements. The Competition Commission of India keeps a vigilant eye on anti-competitive agreements either horizontal or vertical. However, international or domestic liner shipping agreements are exempted from the ambit of Indian competition law with an objective of an increase in productivity and reducing costs and environmental burden.

The Convention on the Code of Conduct for Liner Conferences (1974)³ defines a liner conference as “a group or alliance of two or more vessel-operating carriers which provides international liner services for the carriage of cargo through a particular route or routes within the specified geographical limits and which has an agreement or arrangement, whatever may be its nature, within the framework of such agreement they operate under uniform freight rates and any other agreed terms with respect to the liner services”. In modern competition law terminology, it falls under the definition of a price-fixing cartel.

The fundamental block of the liner shipping industry is co-operative agreements as the industry requires extensive co-operation among competitive carriers. High entry costs and substantive investment requirements, in combination with trade imbalances and low margin, are often cited

² Organization for Economic Co-operation and Development Global Forum on Competition, *Objectives of Competition Law and Policy*, CCNM/GF/COMP (2003)3, (2003).

³U.N. Completion of the work of the Conference, *Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences*, TD/CODE/RES/1, (1973, 1974).

to justify cooperation in resource pooling in order to achieve economies of scale and to provide reliable and efficient shipping services. Freight rates keep fluctuating routinely, for instance the rates hit a 10-year low in 2013 and container rates are weak due to a combination of poor economy and overcapacity in the global shipping market, which affected the shipping industry immensely.⁴ Hence, shipping exemptions can be used to manage the situation.

Liner conferences are exempted from competition law in many jurisdictions and they remain such. In jurisdictions with exemptions, these have been softened and subjected to certain conditions, with the possibility of investigating the anti-competitive practices of conferences.⁵ In July 2011, the International Chamber of Shipping submitted justification on these exemptions stating that exemptions to liner shipping agreements shall help to cope with seasonal fluctuations, resource pooling for long term investment, non-cargo costs, imbalances between demand and supply, etc.⁶ Similar justifications were provided by the World Shipping Council and European Community Ship-owners Associations.⁷

Liner conferences have been in existence since sea trading emerged. The liner conferences started losing their powers after the 1970s. The adoption of the Ocean Shipping Reform Act in the United States of America in 1998, along with a report by the Organization for Economic Cooperation and Development in 2002, changed the international landscape for liner conferences. The main change introduced by the Act was to allow confidential service contracts with carriers outside conferences, which no longer needed to be made public. This increased

⁴ United Nations Conference on Trade and Development, *Review of the Maritime Transport*, UNCTAD/RMT/2014, (2014).

⁵ United Nations Conference on Trade and Development, *Challenges Faced by Developing Countries in Competition and Regulation in the Maritime Transport Sector*, TD/B/C.I/CLP/49 , Seventeenth session, (2018).

⁶United Nations Economic and Social Commission for Asia and Pacific, *Shipping Block Exemption from Competition Law*, (2015).

⁷ *Id.*

competition and contributed to reducing the importance of conferences. The Organization for Economic Cooperation and Development report questioned whether antitrust exemptions for liner conferences could be justified. The OECD, upon examination of the economic rationale for such agreements, found that there was no compelling evidence of benefits for shippers and consumers. This was later on explained in its 2015 report.⁸

In the year 2013, the Ministry of Corporate Affairs for the first time exercising its powers under Section 54 (a) of the Competition Act⁹ exempted Vessel Sharing Agreements from the purview of Section 3 of the Competition Act, 2002 for a year.¹⁰ The MCA notification exempted all Vessel Sharing Agreements in Liner Shipping with respect to carriers of all nationalities operating ships of any nationality from any Indian port. The exemption subsequently was thereafter given on a yearly extension at the end of every previous extension. However, the practice changed in 2018 when the extension so granted by the MCA was for the next 3 years.¹¹

The 2018 notification for the extension of the exemption from Section 3 differs from the original notification. The exemption in an important sense (the basic difference between the two notifications being the time period of the exemption from the purview of Section 3) as the same provides for reasons due to which the Government may decide to rescind the exemption so granted under the notification. The Government may any further complaints regarding the fixing

⁸ Organization for Economic Cooperation and Development, *Competition Issues in Liner Shipping*, DAF/COMP/WP, (2015) (“hereinafter OECD on Liner Shipping”).

⁹ The Competition Act, § 54, cl. a (2002).

¹⁰ Ministry of Corporate Affairs, S.O. 3641(E), pt. II sec. 3(ii) (December 11, 2013). <http://egazette.nic.in/WriteReadData/2013/157316.pdf>.

¹¹ Ministry of Corporate Affairs, S.O 3250 (E), pt. II sec. 3(ii) (July 4, 2018) (India). <http://egazette.nic.in/WriteReadData/2018/187087.pdf>.

of prices, limitation of capacity or sales, and allocation of markets or customers comes into notice.¹²

2. EXEMPTION POLICY IN OTHER JURISDICTIONS

3.1. China:

China is one of the leading global exporters accounting for 29% of the world's container ports and 48% of container port volumes which are handled in the top 40 container terminals.¹³ In China the Ministry of Transport is responsible for enforcing maritime transport regulations which are in effect since 2002.¹⁴ These regulations aim to regulate transportation and protect fair competition; it also applies to liner agreements to and from the ports of China.¹⁵ Under the regulation, the liner and freight-rate agreements must be filed with the Shanghai Shipping Exchange as it is exclusively designated for this purpose. There is no explicit exemption notification provided, whereas the Shipping Exchange considers each and every agreement filed and decides accordingly.¹⁶ In 2014, the Ministry of Commerce reviewed the P3 alliance between Maersk, Mediterranean Shipping Company and CMA CGM and did not authorize the alliance. The justification given was that the alliance would significantly enhance the market power of the

¹² *Id.*

¹³ UNCTAD stat database.

¹⁴ Regulations on international maritime transportation, Order of the State Council of China No. 335, (2001).

¹⁵ M Drenan, *Watchdogs of the world: Global Liner Conference Regulators in the Modern Shipping Market and Why the P3 Agreement Failed*, 24 MICHIGAN STATE INTL LAW REV. 79, (2015).

¹⁶ Annie Zhu, *China Levels VAT Playing Field for Foreign Shipping Companies*, JOC.COM (Dec. 19, 2013) https://www.joc.com/regulation-policy/transportation-regulations/international-transportation-regulations/china-levels-vat-playing-field-foreign-shipping-companies_20131219.html.

parties and market concentration on the Asia-Europe route, which would create entry barriers to this route as the combined capacity of the carriers reached around 46.7% in 2014.¹⁷

3.2. United States:

The Federal Maritime Commission is the independent regulatory agency that regulates seaborne transportation in foreign commerce for the benefits of United States exporter, importer, and consumer.¹⁸ It tries to ensure competitive and effective maritime transportation services and also monitors agreements by the carriers and service contracts with regard to effects on prices. The Shipping Act 1984¹⁹ removed the requirement of approval by the Commission for the liner shipping agreements. The Ocean Shipping Reform Act 1998²⁰ provides an alternative competition enforcement regime as opposed to complete exemption of liner shipping agreements by including limited antitrust immunity for the agreements. The Act further allows liner shipping companies to enter into confidential contracts. Under the Act, the parties must notify the Commission about the existence of agreements and state their purpose. The Commission conducts a competition impact assessment and monitoring report before authorizing the agreement.

3.3. European Union:

The EU first adopted block exemption in the year 1995 which has been reviewed various times. The current block exemption is extended until April 2020.²¹ Anti-competitive practices of liner

¹⁷ Mark Odell, *Big three container shipping groups plan alliance*, FINANCIAL TIMES (London, June 18, 2013); Ministry of Commerce of China, Announcement No. 46, (2014).

¹⁸ OECD on Liner Shipping, *Supra* note 8.

¹⁹ Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67.

²⁰ Shipping Act of 1984, Pub. L. No. 105-258, 112 Stat. 1902.

²¹ 2009 O.J. (L256)31. (“hereinafter EU Regulation”).

conferences on routes to and from the European Union are not exempted from Article 101(1)²² of the Treaty on the Functioning of the European Union 2007.²³ The conferences do not include price-fixing agreements; instead, they improve productivity and quality of shipping services through economies of scale.²⁴ Any agreement or arrangement crossing the automatic route threshold goes through strict scrutiny by the European Commission in order to examine its adaptability and consequences. It is noteworthy that the commission has stressed on having a mechanism to provide healthy competition, whereby no party can take any undue advantage. The Commission also conducted a detailed review of the P3 alliance and analyzed the possible effects on the market that exchange of information and foreclosures would have created.²⁵

3.4. Japan:

Japan's Antimonopoly Act 1945 provides exemptions to the liner conferences. The exemption is justified based on seasonal fluctuations in the volume of cargo, large scale industry and extreme fluctuations due to shifts in supply and demand. Article 28 of the Act provides exemptions to the agreements dealing with subject matters such as Freight Rates, Charges, Trade Routes, Ship Deployment, and Cargo loading; given that certain conditions are fulfilled.²⁶ It is mandatory for shipping services that wish to avail of this exemption to file the requisite information regarding

²² Art 101(1). The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

²³2006 O.J. (L269)1. /.

²⁴EU Regulation, *Supra* note 21.

²⁵ OECD on Liner Shipping, *Supra* note 8.

²⁶ James L. Hildebrand, *Mitsuo Matsushita, Antimonopoly Law of Japan-Relating to International Business Transactions*, 4 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 124, (1972).

such agreements with the Minister of Transport, Government of Japan who would then scrutinize the agreement and sanction or modify or refuse the same. Whilst deciding the application the Japanese Minister for Transport must also consult with the Fair Trade Commission in order to review the compatibility with the competition law provisions.

3.5. Singapore:

Section 36²⁷ of Singapore's Competition Act, 2004 (SC Act) has given power to the Minister for Trade & Industry to make an order exempt a particular category of agreements from the prohibition on anti-competitive agreements, decisions and practices. This can be done under the purview of Section 34²⁸ of the Act and the recommendation of Competition and Consumer Commission of Singapore (CCCS). These exempted agreements must-have characteristics such as; firstly, the agreement or practice must lead to an increase in production or distribution. Secondly, it should lead to the promotion of technical or economic progress. Thirdly, the agreements should not impose restrictions on any concerned undertakings and lastly, it should not allow the undertakings to eliminate competition in respect of services. CCCS has also imposed that if the aggregate market share of a liner shipping conference exceeds 50% the

²⁷ 36. Block exemptions- (1) If agreements which fall within a particular category of agreements are, in the opinion of the Commission, likely to be agreements referred to in section 41, the Commission may recommend that the Minister make an order specifying that category for the purposes of this section.

²⁸ 34. (2) For the purposes of subsection (1), agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they —

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

parties are required to file their agreement or any variation to it to the CCCS to eliminate chances of anti-competitive behavior.²⁹

3.6. Australia:

Under Part X of Competition and Consumer Act 2010, exemptions are provided to the liner shipping conferences in Australia provided that they meet certain conditions.³⁰ (i) all the shipping companies must be registered under Australian agent and must provide information; (ii) the company proposing liner shipping agreement should register such agreement; (iii) the registered agreements must meet a list of pre-conditions; (iv) shipping companies must notify their bodies about the agreements; (v) shipping company with a major market share must be registered under Registrar of Liner Shipping.³¹ Despite the exemption provided investigations can be initiated by the Ministry for Infrastructure and Transport, Australia.

3. COMPARISION WITH INDIAN EXEMPTION POLICY AND SUGGESTIONS

Comparing Indian exemption policy with the policies of other international jurisdictions helps to overcome the loopholes. The approach taken by most of the above-mentioned countries is providing specific outlines as to the content and conditions of the agreement and making it clear as to what is exempted and what is not. This approach provides advantages in terms of effective control and monitoring over these agreements. For instance, Singapore finds it easier to monitor the agreements where conditions are laid down to avail the exemption, thus increasing the

²⁹ Order of the Competition Commission Singapore <https://www.cccs.gov.sg/approach-cccs/filing-under-block-exemption-order>.

³⁰ *Shipping Australia: Liner Block Exemption Not a Way to Go*, WORLD MARITIME NEWS (Nov. 2017) <https://worldmaritimeneeds.com/archives/177527/shipping-australia-liner-block-exemption-not-a-way-to-go/>.

³¹ *Liner shipping in spotlight as Australian government supports abolishing blanket exemption*, PARR, (Nov. 2015) <https://www.lexology.com/library/detail.aspx?g=22574a2a-0adc-4787-8cea-6af6d09279ff>

effectiveness.³² Whereas various other jurisdictions prefer that such agreements are submitted to the government for scrutiny before execution.³³

The international jurisdictions mentioned above have a separate statute or procedure relating to the control and regulation of liner shipping agreements. These enactments facilitate the governments' better control over the business and also increase the efficiency of Commissions. It is evident that this sector has been recognized and given adequate credit in the above jurisdictions and the exemptions are laid out to provide better business opportunities for shipping companies. The primary reason behind imposing such exemptions is the high cost in the sector and also the goal of the commissions to provide customers with the benefit of lowered costs and stability in the industry.

The notification by the Ministry of Corporate Affairs³⁴ in comparison with the above jurisdictions can be construed to have brought about a blanket exemption and is not sufficient enough to control the conduct of the sector. It can also be construed from the above-mentioned policies in other countries that, all these nations have strictly formulated schemes of mechanism and have been successful in maintaining healthy competition in their respective jurisdictions.

The Indian exemption policy does not lay any condition or prerequisite compliance to avail such exemptions. The exemption is blindfolded and not in the spirit of the CCI. Also considering the monitoring of liner shipping agreement, there is no specific mechanism in force or has been provided under the notification or any other law. In the absence of such a mechanism, it is almost impossible for the Director-General of Shipping to evaluate and monitor the shipping

³² *Supra* note 29, 31.

³³ *Supra* note 16, 20, 28, 33.

³⁴ *Supra* note 10.

agreements. The notification is also not specific about the application of it to the agreements with respect to carriage movement in domestic waterways.

Thus it is important for the government to provide clarity to the above-mentioned ambiguities for efficient administration. To clear these ambiguities a reference can be made to the exemption policies of well established international shipping jurisdictions as the exemptions provided by these jurisdictions are concrete and subject to conditions and obligations.³⁵ From the above, it can be deduced that there is a need to further look into the shipping exemption in order to eliminate instances of misuse and ensure proper implementation in India.

4. CONCLUSION

The Ministry of Corporate Affairs through its shipping notification has attempted to promote economic activities but it falls short of perfection. After considering other international jurisdictions, they follow a strict scrutiny mechanism before allowing the shipping companies to enjoy exemption privileges. The state must adopt two essentials for successful implementation of the exemptions by laying down prerequisites to be followed and by vesting the power with the authorities to examine and decide over misuse of such exception. Before allowing the execution of any liner shipping agreement the ministry must consult the CCI over the implications of the agreement on the market. Hence an application procedure can be developed with a deeming provision. Considering the above suggestions, it can be concluded that it is imperative to revise

³⁵ P. Manoj, *Shippers Wary as India exempts vessel sharing pacts from antitrust law*, (Dec. 2013) <https://www.livemint.com/Opinion/d5qWrgwTzOKlKMdF0b7rjM/Shippers-wary-as-India-exempts-vessel-sharing-pacts-from-ant.html>.

the shipping notification which will further enable the authorities to prevent any misuse of the exemption policy or anti-competitive behavior by the liner shipping companies.