SLAUGHTER AND MAY

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Hong Kong Competition Commission issues block exemption order for the liner shipping industry

On 8 August 2017 the Hong Kong Competition Commission (HKCC) issued a **block exemption order** (BEO) under section 15 of the Competition Ordinance (Ordinance) for certain agreements between liner shipping companies. This means that these agreements are excluded from the application of the First Conduct Rule (which prohibits anti-competitive agreements), subject to certain conditions. The HKCC has published a **Statement of Reasons** to accompany the order.

The Hong Kong Liner Shipping Association (HKLSA) made the application for the BEO three days after the Ordinance came into effect in December 2015.[1] In September 2016 the HKCC published a proposed BEO (as covered in the September 2016 edition of the Slaughter and May Competition & Regulatory **Newsletter**) and conducted a three-month public consultation, which was followed by the lodging of a supplementary submission by the HKLSA in January 2017. All relevant publications are available on the HKCC's website under the block exemptions order register for **Case BE/0004**.

This is the first BEO (and formal enforcement decision) to be issued under the Ordinance. Whilst the HKCC's analysis in this case is specific to the facts of the industry, the HKCC's approach sheds light on, in particular, the evidentiary standard expected by the HKCC in satisfying the criteria for the economic efficiency exclusion in Schedule 1 of the Ordinance. This is relevant to any undertaking looking to rely on this exclusion, whether by self-assessment or in applying for a decision (for a specific agreement) or a BEO (for a particular category of agreement).

The scope of the BEO

The HKCC has issued a BEO for vessel sharing agreements (VSAs). VSAs (which include consortia, slot exchange agreements, joint service agreements and alliances) are agreements between shipping lines on certain operational arrangements.

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

[1] Slaughter and May advised the HKLSA on this matter, including on the making of the application.

The HKCC has issued the BEO in light of its assessment that the criteria for the economic efficiency exclusion in Schedule 1 of the Ordinance are met. The economic efficiency exclusion provides that the First Conduct Rule (which prohibits anti-competitive agreements, concerted practices and decisions which have the object or effect of preventing, restricting or distorting competition in Hong Kong) does not apply to any agreement that:

- contributes to (i) improving production or distribution or (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit;
- does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of those efficiencies; and
- does not afford the undertaking concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

The BEO is subject to certain conditions, which include the following:

- the parties to the VSA not collectively exceeding a market share limit of 40%;
- the VSA not authorising or requiring shipping lines to engage in cartel conduct; and
- shipping lines being free to withdraw from the VSA without incurring a penalty if a reasonable period of notice is given.

The duration of the BEO is five years. The HKCC proposes to review the BEO four years from its commencement date, but in any event may review the order at any time it considers appropriate.

Agreements outside the scope of the BEO

HKLSA's application had also sought a BEO covering voluntary discussion agreements (VDAs). VDAs are agreements pursuant to which shipping lines discuss certain commercial matters relating to particular shipping routes. In its supplementary submission, in early 2017, the HKLSA sought a BEO for a 'revised VDA scope', which expressly carved out Hong Kong-specific pricing discussions from the application in order to address the HKCC's concerns.

The HKCC decided not to issue a BEO for VDAs, or the revised VDA scope, on the basis that it was not demonstrated that the criteria for the economic efficiency exclusion were met. In particular, the HKCC noted a lack of evidence or data in support of the arguments put forward in the application. The HKCC's view was that the empirical evidence presented did not adequately substantiate the efficiency claims to allay the HKCC's concerns.

The HKCC notes in its Statement of Reasons that the decision to not grant a BEO for VDAs does not necessarily mean that the HKCC has formed a view on whether it has reasonable cause to believe that the relevant information sharing activities would amount to a contravention of the First Conduct Rule.

In addition, the HKCC has taken the extra step to provide guidance in its Statement of Reasons as to which VDA activities may give rise to competition concerns, and which would be unlikely to contravene the Ordinance.

The HKCC will apply transitional arrangements, in the form of a grace period of six months ending on 8 February 2018, for parties to (i) any VSAs which do not benefit from the BEO, and (ii) VDAs, so as to allow such parties to make any changes they may consider necessary to their commercial arrangements.

Implications for the liner shipping industry in Hong Kong

The decision to grant a BEO for VSAs is consistent with the approach in most other jurisdictions around the world. In respect of VDAs, different countries are taking different approaches, with the HKCC following in the footsteps of the European Commission in not granting a BEO. A number of countries, including China, Japan, Korea, Malaysia, Singapore and the USA, continue to grant exemptions from competition law for VDAs. The challenge for the industry will be to ensure full compliance with the different legal frameworks of the various countries in which they operate.

The full impact of the decision, particularly in relation to VDAs, remains to be seen, as Hong Kong vies to maintain its attractiveness as an international maritime centre and a part of China's 'Belt and Road' project to develop a trade network throughout Asia and beyond.

Implications for other sectors

The HKCC's decision provides helpful insight into its approach for future block exemption applications. Whilst each industry will have a different set of facts, this decision provides useful guidance on, in particular, the evidentiary standard expected from the HKCC in satisfying the criteria for the economic efficiency exclusion in Schedule 1 of the Ordinance.

The HKCC has placed particular emphasis on empirical evidence. Any such evidence presented in future applications will need to be sufficiently adequate to allay any concerns the HKCC might have. The evidential burden is therefore likely to vary depending on the facts of each case and the extent of the HKCC's concerns.

The HKCC has indicated a particular reluctance to take into account "broad efficiencies" (i.e. to the wider Hong Kong economy) without sufficient supporting evidence. The HKCC has noted that regardless of whether such broad efficiencies should be accepted as falling within the scope of the economic efficiency exclusion, it is still necessary to show the causal link between the information sharing activities and the alleged broad efficiencies. Any assumptions or arguments in this respect will need to be substantiated with a sufficient amount of empirical evidence.

For similar reasons, the HKCC has indicated a reluctance to adopt a broad definition of "consumer" (i.e. in this case, beyond direct users of liner shipping services) for the purposes of the economic efficiency exclusion. Any such arguments will need to be substantiated with sufficient evidence that the claimed efficiencies are passed through to end users. In summary, the HKCC has adopted a narrow interpretation of the criteria for the economic efficiency exclusion set out in Schedule 1 of the Ordinance. This is relevant to any undertaking looking to rely on this exclusion, whether by self-assessment or in applying for a decision (for a specific agreement) or a BEO (for a particular category of agreement).

Other developments

Antitrust

CMA drops Unilever ice cream abuse of dominance investigation

On 9 August 2017 the Competition and Markets Authority (CMA) **closed** its investigation into a suspected abuse of dominance by Unilever in the supply of single-wrapped impulse ice cream[2] in the UK, finding no grounds for action.

The CMA launched the investigation in February 2017 under the Chapter II prohibition in the Competition Act 1998 and Article 102 of the Treaty on the Functioning of the European Union (TFEU). The CMA focused on a period from January 2013 to February 2017 in which Unilever had run a series of promotional deals in the form of 'package offers'. In exchange for purchasing a minimum number of single-wrapped impulse ice cream products, Unilever supplied retailers additional products at reduced prices or free of charge. The CMA investigation considered whether package offers would be likely to exclude competitors as the additional volume supplied by Unilever may fill (or nearly fill) the freezer capacity of the retailers (which is generally constrained).

However, the CMA concluded that although Unilever was likely to have had an "*assured base of sales*" in the four year period due to the strength of its 'must-have' ice cream products and its reservation of capacity in the freezers it supplies, the structure and availability of Unilever's package offers (i.e. whether they included both non-contestable and contestable products and whether they were available during periods of higher or lower sales volumes), taken together with the purchasing patterns of retailers, meant that the deals were unlikely to have had an exclusionary effect. In particular the CMA noted that the larger offers (which it considered were more likely to involve volumes that would be capable of filling freezers) were standalone promotions that were available for one calendar month in February and March, whereas most impulse ice cream sales take place in the summer. Although not essential to the decision the CMA also took into account the relatively limited take up of the larger offers and absence of any clear effect on market shares.

The decision's impact is likely to be of interest to dominant companies in a range of sectors looking to offer short-term promotions. Overall it supports the view that such activity is permissible if kept within reasonable limits having regard to the structure of the market in question and the likely impact on the ability of others to compete.

[2] Impulse ice cream products are those purchased for immediate consumption, as opposed to ice cream purchased for consumption at home. Single-wrapped impulse ice cream refers to wrapped ice cream products sold individually at the point of sale. Other types of impulse ice cream are soft serve, scoop and slush ice cream.

Hong Kong Competition Commission brings second case before the Competition Tribunal

On 14 August 2017 the HKCC **announced** that it brought its second case before the Competition Tribunal against ten construction and engineering companies (or their representatives) for engaging in market sharing and price fixing conduct in the provision of renovation services at a public rental housing estate. The HKCC is seeking: (i) pecuniary penalties; (ii) a declaration that each party has contravened the First Conduct Rule of the Competition Ordinance (which prohibits anti-competitive agreements); (iii) an order against each party to pay to the Government the costs of investigation by the HKCC; and (iv) the costs of the proceedings before the Tribunal.

First, the alleged market sharing conduct concerned the allocation by the contractors amongst themselves of specific floors of the housing estate project, whereby they would not actively seek, or accept business, from tenants on floors allocated to other contractors and/or would direct such tenants to the allocated contractor of that floor. Second, the alleged price-fixing conduct concerned the joint production and use of promotional flyers in advertising decoration works, which contained package prices for different services (Flyer Prices) and were used by all the relevant contractors. The HKCC alleges this therefore either *determined* the transaction price (where prices were not further negotiated) or *influenced* the transaction price by either using the Flyer Prices as the starting or reference point for negotiations or giving the impression that the Flyer Prices were indicative of "standard pricing" or that all contractors charged similar prices.

The ten construction and engineering companies stated as the respondents to the HKCC's application are W. Hing Construction Company Limited, Sun Spark Construction Limited, Mau Hang Painting & Decoration Co, Tai Dou Building Contractor, Kam Kee Machine Electrical Iron Works Company Limited, Hip Yick Construction Company, Tai Wah Civil Engineering, Wai Sun Iron & Decoration Co, Wide Project Engineering & Construction Co and Luen Hop Decoration Engineering Co Limited. In some cases, specific individuals have been named on the originating notice of application as well as the trading companies.

Regulatory

Ofgem announces investigation into possible abuse of dominance in the provision of services

On 11 August 2017 the Office of Gas and Electricity Markets (Ofgem) **announced** the opening of an investigation into a suspected abuse of dominance by an unnamed company providing services to the energy industry. The regulator is looking into any infringement of the provisions of Chapter II of the Competition Act 1998 and/or Article 102 TFEU on abuse of a dominant position. The investigation is currently in the initial information gathering and evidence assessment phase and Ofgem expects to give a further update by the end of December 2017.

This announcement follows the **opening** of a separate investigation in October 2016 into a potential infringement of the prohibition of anti-competitive agreements and concerted practices under Chapter I

of the Competition Act 1998 by a small number of unnamed parties. A further update on this investigation is expected by the end of September 2017.

These investigations are the only publicly announced investigations by Ofgem using its competition law powers. The decision to open a further investigation can also be seen against the backdrop of the CMA's **report** on the operation of the concurrency arrangements published on 28 April 2017 which noted that regulators were keen to use the Competition Act 1998 powers but that the number of new cases remained below the desired level.

Brussels	London	Hong Kong	Beijing
T +32 (0)2 737 94 00	T +44 (0)20 7600 1200	T +852 2521 0551	T +86 10 5965 0600