SLAUGHTER AND MAY

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

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The Hong Kong Competition Commission has issued its first block exemption order since the coming into force of the Competition Ordinance in December 2015. The order provides a block exemption for vessel sharing agreements between liner shipping companies. This Client Briefing considers the scope of the order and its implications for the liner shipping industry and other sectors more generally in Hong Kong.

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, meaning 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), advised by Slaughter and May, made the application for the BEO three days after the Ordinance came into effect in December 2015. 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 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.

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 do not collectively exceed a market share limit of 40%;
- the VSA does not authorise or require shipping lines to engage in cartel conduct; and
- shipping lines are free to withdraw from the VSA without incurring a penalty on giving a reasonable period of notice.

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 are 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 which will end 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 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 BEO (for a particular category of agreement).

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